Supreme Court, U. S.
FILED
MAR 11 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1266

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC.,

and

LAKES AREA REGIONAL MEDICAL PROGRAM, INC., and MEDICAL CARE DEVELOPMENT INCORPORATED, on behalf of themselves and all others similarly situated,

and

JEROME S. WAGSHAL,

Petitioners,

v.

THE HONORABLE JOSEPH A. CALIFANO, JR., individually and as Secretary of Health, Education, and Welfare; THE HONORABLE ROY L. ASH, individually and as Director of the Office of Management and Budget, HERBERT B. PAHL, individually and as Acting Director of the Regional Medical Programs Service of the Department of Health, Education, and Welfare; THE HONORABLE GEORGE PRATT SCHULTZ, individually and as Secretary of the Treasury, ELMER B. STAATS, individually and as Comptroller General of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME S. WAGSHAL
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

LAWRENCE H. MIREL
918 - 16th Street, N.W.
Washington, D.C. 20006

JOHN W. GARLAND
1926 - 6th Street, N.W.
Washington, D.C. 20001

Attorneys for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 638-4521

Page

TABLE OF CONTENTS

OPINIONS BELOW 2
JURISDICTION 3
QUESTIONS PRESENTED 3
STATUTES AND REGULATIONS INVOLVED 4
STATEMENT OF THE CASE 6
A. The Decision On The Merits 7
1. The Initial Decision 9
2. The Amendment to the Initial Decision 10
B. The Fee Award Proceedings In The District Court 11
C. The Decision of The Court of Appeals 15
D. Related Cases 21
REASONS FOR GRANTING THE WRIT 22
A. The Court of Appeals' Decision Was Basically Inconsistent With The Result In The Case On The Merits And In Effect Sanctioned An Unconstitutional Impoundment 26
1. The Court of Appeals' Decision Errs by Ignoring Three Relevant Statutes Prohibiting HEW From Holding The Fund 27
2. The Court of Appeals' Decision Errs By Relying On An HEW Regulation In Violation of Basic Constitutional Doctrine 28
B. The Court of Appeals' Decision Imposed A Novel And Improper Requirement For The Exercise of In Personam Jurisdiction In A Fee Award Proceeding 29
CONCLUSION 31
APPENDIX:
Findings of Fact and Conclusions of Law on The Merits by the District Court 1A
Final Order on the Merits by the District Court 17A

Page

Amendment to Final Order on the Merits by the District Court 19A

Memorandum Opinion Awarding A Fee by the District Court 22A

Order Awarding A Fee by the District Court 42A

Opinion of the Court of Appeals Overturning the District Court's Award 46A

TABLE OF CITATIONS

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 22, 23, 29

Celebrezze v. Sparks, 342 F.2d 286 25

Central RR & Banking Co. v. Pettus, 113 U.S. 116 (1885) 8, 23

Dickenson v. Stiles, 246 U.S. 631 (1918) 25

Dixon v. United States, 381 U.S. 68 (1965) 29

Freeman v. Ryan, 133 U.S.App.D.C. 1, 408 F.2d 1204 (1968) 25

Folsum v. McDonald, 237 F.2d 280 (4 Civ. 1946) 25

Fuller v. Oregon, 417 U.S. 40 (1974) 24

Hall v. Cole, 412 U.S. 1 (1973) 14, 24

Honda v. Mitchell, 136 U.S.App.D.C. 22, 419 F.2d 324 (1969) 25

Houston v. Ormes, 252 U.S. 469 (1920) 25, 28

Lindy Bros. Builders, Inc. v. American R.&S. San. Corp., 487 F.2d 161 (3 Cir. 1973) 23

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 28

Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) 13, 24

Morton v. Ruiz, 415 U.S. 199 (1974) 29

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 14, 29, 30

National Association for Mental Health v. Weinberger, 68 F.R.D. 387 (D.D.C. 1975), appeal pending sub.

Cases, continued:

Page

nom., *National Association for Mental Health v. Califano*, Nos. 75-2212, 2245 (D.C. Cir.) 22

National Association of Regional Medical Programs, Inc. v. Mathews, No. 76-1015 (D.C. Cir. decided Dec. 13, 1976) 21

National Council of Community Mental Health Centers v. Mathews, Nos. 75-1335, 1353 (D.C. Cir. decided Nov. 9, 1976, pet. for reh. den. Jan. 13, 1977), reversing *National Council of Community Mental Health Centers v. Weinberger*, 387 F. Supp. 991 (D.D.C. 1974) 17, 22, 27

National Council of Community Mental Health Centers v. Weinberger, 361 F. Supp. 897 (D.D.C. 1973) 27

National Treasury Employees Union v. Nixon, 172 U.S. App. D.C. 217, 521 F.2d 317 (1975) 25

Sprague v. Ticonic National Bank, 307 U.S. 161 (1939) 13, 24, 25, 30

Trustees v. Greenough, 105 U.S. 527 (1882) 24, 29

United Federation of Postal Clerks v. United States, 61 F.R.D. 13 (D.D.C. 1973) 25

United States v. Equitable Trust Co., 283 U.S. 738 (1931) 24, 25

Statutes:

28 U.S.C. §1254(1) 3

28 U.S.C. §1331 10

28 U.S.C. §1361 10

28 U.S.C. §2412 . . . . . 3, 4, 13, 27

28 U.S.C. §665b 4, 10, 27, 28

42 U.S.C. §299 7

Medical Facilities Construction and Modernization Amendments of 1970, Sec. 601, 85 Stat. 353, 42 U.S.C.A. §201 note 5, 10, 27

Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91 10

Statutes, continued: Page

Pub. L. No. 93-245, Sec. 501, 87 Stat. 1077 ..... 5, 10, 14, 17, 28

Rules, Regulations, and Miscellaneous:

Rule 23, Fed.R.Civ.P. 30

45 C.F.R. 374, subpart Q, Appendix F 5

Advisory Committee Notes, Rule 23 Fed.R.Civ.P., 28 U.S.C.A. Rule 23, p. 302 30

S. Rep. No. 93-414 28

S. Rep. No. 93-614 28

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC.,

and

LAKES AREA REGIONAL MEDICAL PROGRAM, INC., and MEDICAL CARE DEVELOPMENT INCORPORATED, on behalf of themselves and all others similarly situated,

and

JEROME S. WAGSHAL,

Petitioners,

v.

THE HONORABLE JOSEPH A. CALIFANO, JR., individually and as Secretary of Health, Education, and Welfare, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on December 13, 1976, and the subsequent orders of that Court entered January 31, and February 11, and 16, 1977.

OPINIONS BELOW

This petition seeks review of a decision by the court of appeals overturning a class action fee award made by the district court under the equitable "common benefit" principle. The original decision by the district court on the merits of the litigation as instituted on behalf of the plaintiff class is unreported, and was rendered in the form of Findings of Fact and Conclusions of Law and a Final Order, on February 7, 1974. These are set out in the Appendix, pp. 1A-18A. The Final Order was amended by consent on July 22, 1974, and this amendment, also unreported, is set out in the Appendix, pp. 19A-21A. Thereafter, upon application of the attorney representing the plaintiff class, Jerome S. Wagshal, the district court on May 19, 1975, issued its Memorandum Opinion, reported at 396 F.Supp. 842, and Order, which is unreported. These are set out in the Appendix, pp. 22A-43A. The fee award was reversed by the court of appeals in a decision entered December 13, 1976, as yet unreported, which is set out in the Appendix, pp. 44A-56A.

The court denied a timely motion for extension of time to petition for rehearing. App. 59A. Petitions for rehearing were lodged by all petitioners herein on February 2, 1977 with motions for leave to file them out of time or to extend the time for filing the same to February 2, 1977. These were denied as well. App. 60A, 61A.

The Court's attention is respectfully invited to the pendency of related cases, identified *infra* in the Statement of the Case. See pp. 21-22, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on December 13, 1976, and this petition for certiorari is filed within ninety days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

When an attorney who represented a duly certified plaintiff class of medical organizations, and who was retained under an arrangement contemplating a "common benefit" judicial fee award from the class members if the case were successful, obtained the release of over $100 million in federal grant funds plus other substantial benefits for the class, did the court of appeals err in reversing an order of the district court awarding a fee to the attorney payable by the class members under the "common benefit" principle, and specifically:

A. Did the court of appeals err in holding that the attorney could not be paid from the grant funds which the district court had ordered released to the class members, and that 28 U.S.C. §2412 barred such use of the grant funds when three statutes required the full release of the funds and prevented the federal government from retaining the money.

B. Did the court of appeals err in holding that the district court lacked *in personam* jurisdiction to order the class members to pay a fee directly to the attorney who successfully represented the class, on the ground that the plaintiff class was inadequtely represented in the fee application proceeding, when (i) the class members were given adequate notice of the case on the merits and further adequate notice of the fee application, and (ii) it was the unanimous position of the class members that a

fee was justly due the attorney and they were willing to pay such a fee in a judicially-determined amount, and none of the class members wished to appear in opposition to the application, but all supported it, according to unrebutted testimony at the fee hearing.

C. Did the court of appeals err in failing to provide any means or procedure by which the "common benefit" principle could be vindicated by a fee award in this case.

D. Did the court of appeals err in refusing to consider post-decision petitions for rehearing by the class representatives, represented by separate counsel, seeking to correct the court's misconceptions that it was in the best interest of the class to take an adversary position to the attorney who had successfully represented them.

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §2412, 80 Stat. 308

Except as otherwise specifically provided by statute a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. . . .

31 U.S.C. §665b, 87 Stat. 134

Any provision of law which requires unexpended funds to return to the general fund of the Treasury at the end of the fiscal year shall not be held to affect the status of any lawsuit or right of action involving the right to those funds.

42 U.S.C.A. §201 note, 84 Stat. 353

Notwithstanding any other provision of law, unless enacted after the enactment of this Act expressly in limitation of the provisions of this section, funds appropriated for any fiscal year ending prior to July 1, 1973, to carry out any program for which appropriations are authorized by the Public Health Service Act . . . shall remain available for obligation and expenditure until the end of such fiscal year.

Pub.L. 93-245, §501, 87 Stat. 1077

Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated. Such appropriations shall remain available for obligation through the later of the day on which a final determination finding the impoundment legal is made or one year following the day on which the impoundment is found illegal.

45 C.F.R. 374, subpart Q, Appendix F.

A. Purpose and Scope

1. Objectives. This Appendix provides principles for determining the costs applicable to grants and contracts awarded by the Department of Health, Education and Welfare and performed by nonprofit organizations. . . .

* * *

31. *Professional service cost—legal,* accounting, scientific and other.

(a) Costs of professional services rendered by members of a particular profession who are not employees of the institution are allowable . . . when reasonable in relation to the services rendered.

* * *

(d) Costs of legal, accounting and consulting service and related costs, incurred in connection with organization and reorganization, defense of anti-trust suits, and the prosecution of claims against the Government are unallowable.

STATEMENT OF THE CASE

This petition seeks reversal of a determination by the court of appeals that the district court could not make a judicial fee award under the "common benefit" doctrine to an attorney after that attorney successfully represented a plaintiff class of medical organizations known as Regional Medical Programs (hereinafter sometimes "RMPs") in a suit against named government officials, and obtained for these RMPs over $100 million in appropriated grant funds which were being unlawfully withheld or "impounded." The attorney also achieved additional benefits for the RMPs by preventing the defendant government officials from restricting their activities so as to prevent accomplishment their objectives of promoting innovations in the treatment of cancer, stroke and heart disease and related illnesses. The RMPs were private, non-governmental organizations.

The parties to this litigation are the National Association of Regional Medical Programs, Inc. (the "NARMP"), a national organization formed "specifically to prosecute the case on the merits," (30A.); two RMPs—Lakes Area

Regional Medical Program, Inc. and Medical Care Development Incorporated, named plaintiffs and class representatives in the district court (the "class representative RMPs"), and the attorney for the class, Jerome S. Wagshal (hereinafter sometimes "petitioner Wagshal").

Orderly presentation of the facts of this case must be made in three parts: A. The decision on the merits; B. the district court's fee award, and C. the decision of the court of appeals reversing that fee award.

A. The Decision on the Merits

The roots of this litigation lie in the unprecedented policy of the Nixon Administration adopted in 1973 of refusing to release—or "impounding"—federal grant funds which Congress had statutorily mandated be released, and of trying to terminate grant programs which Congress had statutorily directed be continued. Many of these unlawful impoundments were directed at HEW grant programs including the one involved in this case, the Regional Medical Program ("RMP") authority, Title IX, Public Health Service Act, 42 U.S.C. §299, *et seq.* Under this authority, over fifty Regional Medical Programs had been established throughout the United States, and covering all areas of the country, to initiate programs designed to advance medical treatment of heart disease, cancer, stroke, and kidney disease, and related diseases, *i.e.*, the principal disease killers in this country. These RMPs were in active operation in 1973 when the Executive announced the intention to terminate them. All of the RMPs were private organizations, operating either independently or in conjunction with other entities such as medical schools and medical societies. Since they were funded almost entirely by federal grant funds, the withholding of such funds sounded their death knell. See 36-37A.

Convinced that the Executive's intention was of doubtful legality, the RMPs and their personnel sought an attorney, but not before partial withholding of federal grant funds had forced the firing of about two-thirds of the RMP personnel, the demise of three RMPs, and a severe impairment in the functions of those that remained. See 7A. The RMPs were unable to retain counsel at prevailing fee rates in the District of Columbia, and were unsuccessful in obtaining charity representation, which they sought from a number of firms, and other sources. Finally, petitioner Wagshal agreed to take the case under a fee arrangement modeled after that approved by this Court in *Central RR & Banking Co. v. Pettus,* 113 U.S. 116, 125 (1885), *i.e.,* the RMPs agreed to pay an hourly rated fee of $35 which was recognized as being substantially below petitioner Wagshal's regular hourly charge, with the proviso that if the case was successful an appropriate fee would be sought from the benefiting members of the plaintiff class by a judicial award. Pursuant to petitioner Wagshal's advice, the RMPs formed the NARMP as an umbrella organization to be the lead plaintiff, and the two class representative RMPs also joined as named plaintiffs to further represent the class of 53 RMPs. In short this was not that type of class action in which a single class member seeks to represent a large class with no sanction from the rest of the group, but rather a class action essentially supported by the entire membership of the class.

The litigation was filed in September 1973, after the close of FY 1973, and sought the release of the impounded FY 1973 RMP appropriated grant funds, as well as FY 1974 RMP grant funds. (At the time the case was filed, the FY 1974 funds were being trickled out to the RMPs pursuant to a continuing resolution because the FY 1974 HEW appropriation had not been enacted; by

the end of the litigation, however, the FY 1974 appropriation had been enacted.) As a first step, a temporary restraining order was sought preventing the defendant government officials from allowing the FY 1973 RMP funds to "lapse" into the treasury. The district court denied this motion on the ground that plaintiffs were unlikely to prevail on the merits, this denial coming on Friday, September 28, 1973. Petitioner Wagshal noted an appeal immediately, and in an emergency session on Sunday, September 30, 1973, the court of appeals entered an order preventing the defendant government officials from taking any further steps to make the funds unavailable, pending further proceedings in the lower court leading to a disposition of the suit on the merits.

Thereafter, the district court certified the case as a class action pursuant to Rules 23(b)(1)(A), 23b(1)(B) and 23(b)(2), Fed.R.Civ.P., with the class consisting of the RMPs.

1. The Initial Decision

The case then proceeded to judgment on cross-motions for summary judgment, affidavits, etc., and the result was a clean-sweep victory for the plaintiffs and plaintiff class. Most important, defendants' panoply of arguments claiming that the Executive had a constitutional right to negate statutory enactments was squarely rejected, as was defendants' sovereign immunity defense. See App. 12A, 14-15A. The court held that a number of statutory enactments required the Executive to continue to fund the RMPs, and prevented termination of the RMP authority. Three of these statutes relied on by the district court which are particularly significant to this application were:

– Sec. 601 of the Medical Facilities Construction and Modernization Amendments of 1970, 42 U.S.C.A. §201 note, as extended by the Health Programs Extension Act of 1973, Pub.L.No. 93-45, 87 Stat. 91. App.12A. (Hereinafter referred to as "Sec. 601".)

– Sec. 111 of Pub.L. No. 93-52, 31 U.S.C. §665b. App. 13A.

– Sec. 501 of Pub. L. No. 93-245, 87 Stat. 1077. (hereinafter referred to as "Sec. 501".) App. 14A.

The court went on to void various restrictions and limitations which had been placed on the RMPs by defendants and which, aside from the withholding of grant funds, impaired the RMPs' accomplishment of their statutory mission. App. 14-16A.

The district court based its jurisdiction on 28 U.S.C. §§1331 and 1361.

The Final Order which accompanied the Findings of Fact and Conclusions of Law, App. 17-18A, required full obligation of the FY 1973 and FY 1974[1] RMP appropriations to members of the plaintiff class under terms and conditions and for such time periods as were usual and normal prior to the onset of the unlawful impoundments, and rescission of all inconsistent directives.

2. The Amendment of the Initial Decision

Defendants moved to amend the decision, so as to permit them to divert $30 million from the RMP class to other purposes. After a concentrated period of vigorous litigation, the defendant government officials agreed to a consent order permitting the diversion of only $5 million

[1]The FY 1974 RMP appropriation permitted a 5% holdback which is not at issue here. See App. 6A.

to these other purposes, which was in line with practice in earlier years. This amendment, App. 19-21A, was preceded by notice to each class member, and none came forward to object. 29A. By entry of this order, all parties waived their appellate rights. 21A, para. 3. See also, 23A. Later, in the fee decision, the trial judge described this effort as follows (37-38A):

> After entry of *the final order compelling obligation of all impounded funds,* Mr. Wagshal was forced to litigate against efforts by defendants to divert $30 million to other purposes. This effort, involving extensive discovery and new, complex issues not raised earlier in the litigation, again required a great deal of skill and perseverance. In the end Mr. Wagshal succeeded in preserving all but $5 million of the amount defendants wanted to divert to other purposes and even that $5 million was allowed to be diverted only to specific other purposes. (emphasis added)

B. The Fee Award Proceeding In the District Court

Following the success of the case on the merits, petitioner Wagshal applied for a judicial fee award from the benefiting class (23A), as contemplated by the retainer arrangements. Petitioner Wagshal and defendants pursued a vigorous discovery program, petitioner Wagshal's efforts being directed to determination of what RMP funds were then available from which to pay a fee award.

In these interlocutory proceedings the district court responded favorably to a motion by petitioner Wagshal by entering its "Order Reserving Funds Pendente Lite," wherein defendants were ordered to reserve $200,000 from "unexpended balances of grants made pursuant to the Final Order as amended (including grant related income)," the latter being funds earned by the RMPs in

the course of their operational activities. Absent sufficient unexpended grant funds or grant related income to make up the $200,000, defendants were directed to take funds "to the extent necessary to make up the aforesaid total" from unexpended balances of defendants' RMP "direct operations" funds. These "direct operations" funds were part of the overall RMP appropriation covered by the Final Order as amended, which were used by defendants to administer the RMPs. Responding to this Order, defendants reported the reservation of $180,000 in "direct operations" RMP funds.

Thereafter, the district court held a hearing on the fee application. Notice of the hearing was given to each of the 53 RMP class members. Dr. John Ingall, head of the Lakes Area RMP (one of the named plaintiffs, a class representative RMP), who was also Chairman of the NARMP, testified that the heads of all 53 RMPs had been consulted about the fee application, and had endorsed a statement to the court urging that petitioner Wagshal's fee be set in an amount at least comparable to that which would be paid for corporate services of an equivalent nature, and that each of the 53 further endorsed a plan whereby petitioner would be awarded a partial fee averaging $2,000 from each RMP out of available non-grant funds, for a total of $106,000, and such greater amount out of grant funds as the court deemed appropriate.

The district court awarded a class action fee by a three-step process:

(1) The RMPs were ordered to pay petitioner Wagshal directly their respective *pro rata* shares of the total fee award of $105,500, and were further directed to make their payments

> . . . to the extent possible from non-grant funds.[3] If a grantee does not have sufficient nongrant funds to make its *pro rata* payment, it may then use grant funds.

(41A) The reason non-grant funds was used as a first priority source for the fee payment was, as explained in note 3 to the above quotation, that, "defendants do not object to any fee payment from nongrant funds so long as an RMP's operating effectiveness is unimpaired." See also 23-24A. In short, no party to the proceeding objected to a payment from non-grant funds.

(2) Defendants were ordered to make available to the RMP class members supplemental grants in equivalent amounts to the *pro rata* payment each RMP was to make to petitioner Wagshal. These supplemental grants were to be taken from the fund reserved pendente lite, because of the RMPs' "unexpected legal expense." 41A, 42-45A.

(3) Out of the award of $105,500, petitioner Wagshal was directed to refund to the NARMP the "front fee" paid him by that organization at the $35 per hour rate. 30A, 41-2A. By this third step, the benefiting class members were to bear the full burden of the legal services, rather than their umbrella organization.

In making this award, the district court set out a number of conclusions of law. It held that the award fell within the doctrine enunciated by this Court in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), "and many other cases," that the court had inherent equitable powers to spread the cost of the plaintiffs' efforts proportionately among those benefited. 30A. The court rejected the defendant Secretary's argument that the award would violate §2412, holding that

> When this court ruled that defendants' impoundment was illegal and that all impounded funds had to be obligated to grantees, the funds in question

> ceased to be funds of the United States such that an attorney fee might be construed as a fee against the United States

27A. The court found nothing in the Public Health Service Act indicating that Congress intended to restrict the exercise of traditional equitable powers by the district courts, *id.*, and further held that defendant's regulations were no bar to an award. The court held the regulations to be ambiguous, but that even if construed to bar an award, that they could not validly do so. The district court placed particular reliance on Sec. 501, *supra,* by which the Congress had reappropriated any of the FY 1973 appropriation necessary to be appropriated for full obligation of any amounts "determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974. . . ." 28A. The court reasoned that it would be absurd to think that Congress anticipated civil litigation such as the instant law suit but would forbid the litigants to pay the cost of an attorney to bring the action, citing the similar reasoning by this Court in *Hall v. Cole,* 412 U.S. 1, 13-14 (1973).

The court also held that it could exercise *in personam* jurisdiction over the plaintiff class members (29-30A):

> [H]aving *in personam* jurisdiction over all plaintiffs in the case on the merits and having given each RMP actual detailed notice of the pendency of the fee proceeding and having given each RMP notice of its right to participate in this proceeding, the court holds that due process has been satisfied and that the court has valid *in personam* jurisdiction over each class member and can order each to pay a fee directly to Mr. Wagshal. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 965 (1950). This *in personam* jurisdiction rests on the fact that each RMP has been

> before the court on the merits, has benefited from the court's order requiring obligation of the impounded funds, and has been given notice and an opportunity to participate in the instant proceeding.

C. The Decision of the Court of Appeals

The defendant Secretary, et al., appealed, and petitioner cross-appealed on the question of the amount of the fee.

The court of appeals reversed the district court's judgment and held that it could not award any fee. In reaching this result the appellate court overturned the district court's factual findings as well as its legal conclusions. With respect to the use of grant funds as a source of fee payment, the district court had found that, "When this court ruled that defendants' impoundment was illegal and that *all impounded funds had to be obligated to grantees,* the funds in question ceased to be funds of the United States such that an attorney fee might be construed as a fee against the United States." 27A. (Emphasis added) However the court of appeals found that although the district court's order "makes it appear as if the RMPs are the source of the fee payment," this was a "device" by which the district court attempted to "camouflage the true payor of the fee: the government." Although the opinion is not entirely clear in this area, the court appears to have reached this different factual conclusion on several grounds:

First, although not expressly stated, the court of appeals seems to have lumped two of the steps of the payment procedure into one—treating the RMPs' direct payment to petitioner and the other step, the requirement of equivalent supplemental grants to the RMPs from the pendente lite fund, as a single step. See 50-52A. In doing so, the court ignored the fact that petitioner had

already been paid by the RMPs, whereas the Secretary had obtained a stay of the other part of the order requiring the supplemental grants to be paid to the RMPs. 49-50A.

Second, the court noted that there were some technical disputes among the parties with respect to the composition of the pendente lite fund, with the Secretary claiming a particular interest in the "direct operations" part of the RMP appropriation, part of which had been used to make up the pendente lite fund, and petitioner claiming that "direct operations" money could be used, and further that the Secretary had failed to follow the pendente lite order by using "direct operations" funds when unexpended grant funds were available. The court also noted that at the appellate level the Secretary objected to the use of "program income" money [2] as a partial source of fee payment, although no objection was made in the district court. 48-49A. In noting these various disputes, the court of appeals inferentially intermingled the two steps of the fee payment order, since the "direct operations" issue was relevant only to step two—the question of whether that money could be used for the supplemental grants to the RMPs—whereas the question of "program income" was relevent only to step one—the question of the source from which the RMPs could pay petitioner their *pro rata* shares of the fee award.

Third, the court brushed these disputes aside, holding that it was "not important" whether the funds in question were "labled unexpended direct operations or unexpended grant funds . . . . " 51A. The court held that "Both lapse at the end of the budget period into the United States treasury and cannot again be reached by the grantees without an authorization from HEW.[14] " *Id.*

[2] Non-grant funds generated by the use of grant money in operational activities.

The footnote cited only an *ipse dixit* in the Secretary's brief, nothing in the record itself. However, the court also relied on its recent decision in *National Council of Community Mental Health Centers, Inc. v. Mathews,* Nos. 75-1335,-1353 (D.C. Cir. Nov. 9, 1976; pet. for reh. den. Jan. 13, 1977) (hereinafter "the *NCCMHC* decision"). That case involved a grant program, not under the Public Health Service Act as in this case, but under the Community Mental Health Centers Act, as amended, 42 U.S.C. §§2688 *et seq.*[3] Relying on *NCCMHC,* the court of appeals held that

> such unexpended funds properly belong to the government and therefore an award of attorney's fees from these funds would be an award against the United States prohibited by section q412, unless otherwise specifically authorized by another statute. (49-50A.)

Careful analysis of this statement fails to reveal whether the court was referring to the grant funds used by the RMPs to make up part of the payments to petitioner, or the money reserved in the pendente lite fund which the district court had ordered to be used for the supplemental grants to the RMPs; apparently both were encompassed within this holding.

Finally, having decided that 28 U.S.C. §2412 applied, the court of appeals proceeded to consider whether any statute authorized an award from "government" funds, as an exception to §2412. It ignored Sec. 501, which the district court had held as evincing Congressional intent to permit an award from RMP grant funds (28A.); never

[3] The court of appeals has stayed its mandate in *NCCMHC* until March 21, 1977. That case, as this one, involves a claim by petitioner for a class action fee award, and the district court's award was overturned by the same panel of the court of appeals. Petitioner is preparing his petition for writ of certiorari in *NCCMHC* and that petition will be filed shortly.

mentioning that statute. See 52A. However, the court of appeals did cite with approval an HEW regulation which barred use of grant funds for "prosecution of claims against the Government," ignoring both the district court's analysis in rejecting the applicability of this regulation (27-28A.), and the fact that the case had not been brought against "the Government," and that "the Government" was not a party to the litigation. 52A.

Having overturned an *in rem* approach to the award, the court of appeals then proceeded to consider whether the district court could order the RMP class members to pay petitioner directly, by assuming personal jurisdiction over the class members. The court of appeals held that the district court violated due process in assuming personal jurisdiction over the class members, and thus erred in making the award. In arriving at this decision, the court ignored the fact that this issue had not been raised by any party to the appeal, neither the Secretary, nor any class member. It ignored the finding in the district court that the Secretary did not object to fee payment from nongrant funds (23-24A, 41A.), as well as its own finding that "the RMPs had unanimously agreed to pay Wagshal $106,000 from non-grant funds as an 'interim partial' fee payment." 58A., n. 33.

In essence the court of appeals overturned this aspect of the district court's decision based on a holding that the plaintiff class had to be adequately represented in the fee award proceeding, and that it was not so represented. The court of appeals appeared to concede that the notice to the class members (they had received notice of the fee proceeding, and, before that, notice of the resolution of the case on the merits; 29A., 53A.), but held that this was not enough.

The court of appeals treated the fee proceeding as an independent litigation, in which "the parties have

switched positions." 53A. The court of appeals' conception was that petitioner was "suing both HEW and the class members for an attorney's fee," and was at the same time serving as counsel for the NARMP, "an association which includes all 53 RMPs." *Id.* The court held that the NARMP, regardless of its membership, "no longer shares common interests with the individual RMPs since it stands to benefit from the refund due it by Wagshal if attorney's fees are ultimately awarded against the class members." 55A. It further noted that the two class representative RMPs "never submitted any papers to the court and were not represented by separate attorney in this fee proceeding." 54A.

Treating the fee proceeding as a separate and independent litigation in which the RMPs were a defendant class, the court of appeals held that at all stages of a class action there must be an adequacy of representation to meet constitutional standards. 57A. The court concluded that the lack of adequate representation of the "absentee class members, both here and in the district court, denies them due process of law and prevents the court from assuming personal jurisdiction over" them. 58A. The judgment was therefore reversed since the court held that a fee could not be awarded "out of expended federal grant funds," nor from the individual class members. *Id.*

* * *

After entry of the court of appeals' decision, petitioner Wagshal sought other counsel to represent the NARMP and the two class representative RMPs because of the appellate court's remarks about conflicts involved in the proceeding. Of particular concern was the statement (57A.), that

> In the case at bar, NARMP (the purported class representative) is seeking to uphold the district court's judgment *against* the absentee class mem-

bers. This course of action obviously is not in the best interests of the individual class members. (fn. omitted)

Other counsel were sought to represent the class representative RMPs on this issue. To accomplish this petitioner Wagshal sought two stays of the issuance of the mandate of two weeks each, bringing the deadline to January 24, 1977. On January 18, 1977 petitioner Wagshal filed a motion for a third two-week stay, indicating for the first time that new counsel were being brought into the case. On January 31, 1977, a week after the deadline of January 24th had passed, the court denied the motion for stay of its mandate. The parties learned of this denial the next day, February 1st, and on February 2, three petitions for rehearing and suggestions for rehearing in banc were lodged with the court, on behalf of the two class representative RMPs (by separate counsel), the NARMP (by yet another separate counsel), and petitioner, *pro se.*

Accompanying these petitions were motions seeking permission for the late filing, and explaining that the delays had been caused by the difficulty in locating counsel willing to serve without compensation (the NARMP and the two class representative RMPs had no funds for attorneys' fees), and the blizzard in Buffalo, New York, where one of the class representative RMPs (the Lakes Area RMP) was located. The court was advised that the blizzard had interfered with necessary communications.

The thrust of the petitions for rehearing lodged with these motions was that the court of appeals had misconceived the "best interests" of the RMP class, that it was the position of the class and its representatives that the best interests of the class would be to insure that they would have effective legal representation in the future, and that this could only be done through the class action mechanism, and, further, it would be dishonorable to oppose the fee application after the terms of the retainer

were made known to all class members, and the attorney had rendered the valuable service which had perserved the RMPs from unlawful termination. The NARMP further noted that the court of appeals misconceived the facts when it suggested a conflict of interest between it and the RMPs, since the latter were the NARMP's constituency, and the *raison d'etre* of the NARMP was "to prosecute the case on the merits;" it was "organized specifically" for this purpose. 30A. Thus it was unrealistic to conclude that the NARMP had any conflict with its constituency merely because of the refund provision in the fee order.

The court of appeals denied the motions for leave to file these petitions for rehearing on February 11 and 16, 1977. 60A, 61A.

D. Related Cases

Contemporaneously with the filing of this petition, the NARMP is also filing its petition for certiorari seeking review of an unreported order by the same panel of the United States Court of Appeals for the District of Columbia Circuit, affirming an order by the district court in the RMP litigation which permitted the defendant Secretary to "lapse" about $1.8 million in RMP funds. The decision appealed from its *National Association of Regional Medical Programs, Inc. v. Mathews, et al.*, No. 76-1015 (D.C.Cir. decided Dec. 13, 1976). The issue raised by that petition is whether the defendant Secretary can lawfully withhold RMP funds from obligation in view of the repeated Congressional enactments mandating the full release of the funds.

The decision in that case bears on the district court's determination in this case (reversed by the court of appeals), that the "direct operations" part of the RMP appropriation can be used for supplemental grants to the RMPs. Accordingly this Court's attention is respectfully invited to that petition, particularly as it explains, in greater detail, the importance of the three statutes involved in this case. See pp. 27-28, *infra.*

There are two other class action fee cases in which petitioner Wagshal is the attorney-applicant for a fee after successfully representing plaintiff classes in anti-impoundment litigation. One is the *NCCMHC* litigation, *supra,* in which petitioner Wagshal's fee awarded by the district court, 387 F.Supp. 991, was overturned by the same panel of the court of appeals which decided this case. The second is *National Association for Mental Health, Inc. v. Califano,* now pending in the same court of appeals, Nos. 75-2212 and 75-2245. The lower court decision is reported at 68 F.R.D. 387. The issues in these two fee cases are similar in many respects, but not identical to the instant case. It may be, however, that this Court would wish to consider all three cases together because of the common issues presented.

REASONS FOR GRANTING THE WRIT

Review and reversal of the court of appeals' decision is called for because that decision has created an exception to the "common benefit" rule, which heretofore has been "consistently followed." [4]

The effect of this exception is to deprive organizations dependent on government grant funds of the only means available to them to compensate an attorney to represent them against government officials who may be mistreating them. The court of appeals laid down novel doctrines which will result in barring the doors of the federal courts to a particular class of potential litigants whose need for access to the courts may be of great social importance. In addition the court of appeals decision denied compensation to an attorney under the "common benefit" doctrine, after the district court found that he "has helped to confer a very substantial benefit upon the public [and] has greatly benefited the plaintiff class," (36A.), and that he

[4] See quotation from *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 258 (1975), at p. 23, *infra.*

"demonstrated a high degree of skill and has acted in the highest traditions of the Bar of this court. . . ." (38A.)

In a sense, this case is the other side of the coin of *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975). In *Alyeska* this Court barred the judicial award of attorneys' fees from a losing defendant to a victorious plaintiff. However, in doing so this Court reaffirmed

> . . . the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property itself or directly from the other parties enjoying the benefit. That rule has been consistently followed. [citations]

421 U.S. at 257-8 (fn. omitted). So far as we are aware, this Court was correct: the "common benefit" or "common fund" rule has indeed been "consistently followed."[5]

Thus the court of appeals' decision in this case, and the immediately preceding decision in the *NCCMHC* case on which it relies, represented a major, unprecedented break in the heretofore consistent application of the "common benefit" rule. Stripped of the details, in this case petitioner obtained over $100 million, plus additional intangible benefits, for the class which had been duly certified and which he represented under a retainer which contemplated the equitable award of a fee from the benefiting class members if the suit was successful. And yet by the court of appeals' decision, the class members get their $100 plus million and their other benefits, and

[5] Under this rule, reimbursement may be provided the party acting as class representative, and also the attorney who acts on behalf of the class. See *Lindy Bros. Builders, Inc. v. American R.&S. San. Corp.,* 487 F.2d 161, 165-66 (3 Cir. 1973), relying on *Central RR & Banking Co. v. Pettus, supra.*

petitioner gets no fee award at all. Such a result simply does not square with the consistent line of decisions represented by *Trustees v. Greenough*, 105 U.S. 527 (1882), *Central RR & Banking Co. v. Pettus, supra; Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939: *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *Hall v. Cole*, 412 U.S. 1 (1973).

The exception created by the court of appeals in this case affects recipients of grants intended for the promotion of medical services and innovations, and in the *NCCMHC* case, recipients of grants for the establishment of community mental health centers. Thus such grant recipients are deprived of the "common benefit" fee award mechanism as a means of obtaining counsel when they are denied their rights by government officials, and when, as here, they have no other way to compensate counsel adequately for representing them. In *United States v. Equitable Trust Co.*, 283 U.S. 738, 744 (1931), this Court held that the equitable practice of compensating an attorney who preserves a fund, "is absolutely essential to the safety and security of a large number of persons who are entitled to the protection of the law-indeed, stand most in need of it—but who are incompetent to know when they are wronged, or to ask for protection or redress." (fn. omitted) The class members in this case are not incompetent, but, if deprived of the means of compensating counsel through the equitable procedure of a class fee award under the "common benefit" principle, they are effectively deprived of counsel. They are thus the means to assert their rights. As this Court said in *Fuller v. Oregon*, 417 U.S. 40, 53 (1974), "We live in a society where the distribution of legal assistance like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise."

The need for review by this Court of the court of appeals' decision is further underscored by the fact that HEW grant recipients, whose work is of such social importance as to merit public support, are being given an invidious status to that of others who recover government funds. In a substantial line of cases, persons have sued to obtain funds under the control of government officials and fee awards have been made to the attorneys recoverying such monies. See, *e.g.*, *United States v. Equitable Trust Co., supra, Houston v. Ormes*, 252 U.S. 469 (1920); *Dickerson v. Stiles*, 246 U.S. 631 (1918); *National Treasury Employees Union v. Nixon*, 172 U.S.App.D.C. 217, 521 F.2d 317 (1975); *Lafferty v. Humphrey*, 101 U.S.App.D.C. 222, 248 F.2d 82, *cert. den., sub nom., Benton County v. Lafferty*, 355 U.S. 869 (1957); *Honda v. Mitchell*, 136 U.S.App.D.C. 22, 419 F.2d 324 (1969); *Freeman v. Ryan*, 133 U.S.App.D.C. 1, 408 F.2d 1204 (1968); *Celebrezze v. Sparks*, 342 F.2d 286 (5 Cir. 1965); *Folsom v. McDonald*, 237 F.2d 280 (4 Cir. 1946); and *United Federation of Postal Clerks v. United States*, 61 F.R.D. 13 (D.D.C. 1973). Why, for example, should a class of postal clerks suing for their pay be able to compensate their attorney through the equitable "common benefit" doctrine, while medical organizations who are similarly supported by government grants be denied this means of obtaining legal service?

A significant aspect of the court of appeals' decision which merits review and reversal by this Court, is its essentially negative approach. In *Sprague, supra*, this Court held that "when . . . a fund is for all practical purposes created for the benefit of others, the formalities of the litigation . . . hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation." 307 U.S. at 167. The broad equitable powers described in *Sprague* were ignored by the court of appeals, which presented essentially a negative opinion which offered no way in which the district court could

award a fee—despite the unanimous agreement of the class members to the payment of the fee and the fact that it had been paid.

Beyond the fact that the court of appeals' decision was generally inconsistent with the "common benefit" rule and the cases which establish that rule, the decision embodies specific holdings on two subsidiary points which merit consideration by this Court, the *in rem* and *in personam* aspects of the decision. These holdings establish significantly undesirable precedents.

A.

THE COURT OF APPEALS' DECISION WAS BASICALLY INCONSISTENT WITH THE RESULT IN THE CASE ON THE MERITS AND IN EFFECT SANCTIONED AN UNCONSTITUTIONAL IMPOUNDMENT

It is at best paradoxical that the basic impoundment should have been ruled unconstitutional, and "that all impounded funds had to be obligated to grantees," (27A.), but that these same funds should be held to be "funds [which] properly belong to the government" (52A.) when it is proposed to use some of the money for payment of an attorney's fee. In other words, the court of appeals' decision establishes the United States' ownership of the money in connection with the attorney's fee proceeding, after a district court decision on the merits, in which all parties subsequently waived their appellate rights, which established that the funds properly should be paid out to the grantee plaintiff class of RMPs.

In this respect, the two decisions cannot be squared. The court of appeals decision in effect reversed the district court on a factual determination, and also on a final legal determination as to which all parties consented.

1. The Court of Appeals' Decision Errs by Ignoring Three Relevant Statutes Prohibiting HEW From Holding The Fund

The heart of this part of the appeals court decision is the determination that RMP grant funds "lapse at the end of the budget period into the United States treasury and cannot again be reached by the grantees without an authorization from HEW." 51A., fn. omitted. This factual determination was not based on anything in the record, but rather reversed the district court based on the court of appeals' prior decision in the *NCCMHC* case. *Id.*, fn. 14.

However, the court of appeals' decision is remarkable for the fact that it ignores no less than three statutes which mandate the full release of the RMP appropriations, and bar the federal government from retaining this money. These three statutes make the grant funds into non-governmental money and thus outside of §2412. None of the three statutes is even considered in the opinion, although each was relied upon in the decision on the merits in which the funds were released. The first is Sec. 601, *supra*, which is phrased in the obscure terminology of federal accounting procedures, but whose purpose and effect is to require full obligation of all RMP appropriations without administration imposed reductions. 7A, 12A. The legislative history of this statute is set out in detail in the *NCCMHC* case on the merits, 361 F.Supp. 897, 902-3 (D.D.C. 1973), including the passage of the statute over the President's veto, imposed because the funds covered by Sec. 601 "must be spent."

The court of appeals factual determination that the funds "lapse at the end of the budget period into the United States treasury" is squarely contrary to 31 U.S.C. §665b. which provides that any provision of law requiring such a lapse into the treasury "shall not be held to affect the status of any lawsuit or right of action involving the right to those funds." The Congressional

intent was to preserve the rights of "all parties" who might be affected by failure to obligate and expend the funds. See S.Rep.No. 93-414, pp. 5-6. See also 13A. para 10 citing Section 111 of Pub.L. No. 93-52, which was §665b. prior to codification.

Finally, when the administration persisted, despite the above two statutes, in arguing that impounded funds can "lapse" into the treasury, Congress enacted Sec. 501, supra, which reappropriated "[a]ny funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974 . . ." The intent was to make the impounded funds "fully available for obligation pursuant to court order. . . ." S. Rep. 93-614. Again, the court of appeals' decision took no note of this statute though it had been relied on by the district court, both in the decision on the merits (14A.), and the fee award decision (28A.).

2. The Court of Appeals' Decision Errs By Relying On An HEW Regulation In Violation of Basic Constitutional Doctrine

Though ignoring the three statutes which were contrary to its factual determination and legal decision, the court of appeals relied on an HEW regulation prohibiting the use of RMP grant funds to pay legal fees incurred in connection with "the prosecution of claims against the Government. . . ." 50A. Reliance on that regulation overlooked the basic fact that "the Government" was never a party to this litigation. The basic constitutional rule, ignored by the court of appeals, is that when public officials violate the law they cannot claim to be "the Government," and are not shielded by sovereign immunity. *Marbury v. Madison*, 5 U.S. (1 Cranch) 138, 168 (1803). Indeed, this was the key holding in Houston v. Ormes, *supra*, 252 U.S. at 472-4,

a case which is in all significant respects identical to this one except that it comes to the opposite result. An appellate decision so out of harmony with this basic proposition merits correction by this Court.

Indeed, even if HEW had adopted regulations prohibiting the payment of legal fees by grantees victimized by unlawful impoundments, such regulations would be clearly out of harmony with the underlying statutes and therefore invalid. *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Morton v. Ruiz*, 415 U.S. 199 (1974). See 27A-28A. As interpreted by the court of appeals, HEW's regulations allow its officials to violate the very laws under which the regulations were issued, and strip the United States district courts of their traditional equitable powers in lawsuits to restrain such actions.

B.

THE COURT OF APPEALS' DECISION IMPOSED A NOVEL AND IMPROPER REQUIREMENT FOR THE EXERCISE OF IN PERSONAM JURISDICTION IN A FEE AWARD PROCEEDING

From the earliest to the most recent decisions on the "common benefit" rule, the alternative of direct payment by the class members to their benefactor has been contemplated by this Court. In *Trustees v. Greenough*, *supra*, this Court stated that if the class benefactor "cannot be reimbursed out of the fund itself, they [the class members] ought to contribute their due proportion. . . ." 105 U.S. at 532. In *Alyeska*, *supra*, a class fee was held to be awardable "from the fund or property itself or directly from the other parties enjoying the benefit." 421 U.S. at 257. Neither decision suggested that the class had to have "adequate representation" as an essential condition for the district court to make such an award, providing the class had been given notice.

The appellate decision is a novel departure in this regard. As a matter of practical procedure it is unrealistic. If the class members wish to avoid fee payment, all they

have to do under this rule is to ignore the notice of the fee application, and they thereby divest the court of jurisdiction to make an award. This case represents the *reductio ad absurdum* of the court of appeals' insistence on "adequate representation." Here the plaintiff class was in favor of paying a fee award, not merely out of gratitude for past services, but out of prudent desire to maintain their relationship with counsel and insure the availability of future services. However, the unanimous desire by the class members to pay a fair award, even though recognized as such by the court of appeals (58A. n. 33), was twisted by the court into a constitutional barrier against payment of the fee.

All that this court has heretofore required for the exercise of jurisdiction is adequate notice, and an opportunity to appear. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-19 (1950). And this concept has been built into Rule 23 Fed.R.Civ.P. *See* 28 U.S.C.A. Rule 23, p. 302, Advisory Committee notes. The court of appeals decision ignores *Mullane*, though it was relied on by the district court. 29A.

There are relatively few reported cases involving classes of defendants, and it may be that, despite the relative lack of authority on the subject, a requirement of "adequate representation" should be added to the requirement of notice in the ordinary class action involving a defendant class litigating on the merits. However, this rule is patently inapplicable to a fee award proceeding following a successful lawsuit in which a plaintiff class has been benefited. The fee award proceeding may be an independent proceeding, but it is "supplemental to the original proceeding. . . ." *Sprague, supra*, 307 U.S. at 170. It was the court of appeals' failure to recognize this, and its insistence on treating the proceeding as a totally independent action that led it into error.

Unless corrected, the consequences of the court of appeals' rule will be to cripple the class action procedure. Attorneys who benefit classes will necessarily be thrown into an adversary relationship with the class members in order to obtain a fee regardless of the wishes of the parties. And if this becomes a constitutional requirement, there is no reason why it should be confined to *in personam* applications; it would apply as a constitutional standard as logically to *in rem* proceedings as well. The point, however, is that it is equally inapplicable to both, and that the *in personam-in rem* dichtomy should not change the constitutional standard that the requirements of due process in a fee award proceeding under the "common benefit" doctrine are satisfied by adequate notice.

This is what this Court held in *Mullane, supra*, and this rule should be upheld by reversal of the court of appeals' decision.

CONCLUSION

For the reasons stated herein, petitioners pray that this petition be granted and a Writ of Certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

JEROME S. WAGSHAL
Suite 703
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

LAWRENCE H. MIREL
918 - 16th Street, N.W.
Washington, D.C. 20006

JOHN W. GARLAND
1926 - 6th Street, N.W.
Washington, D.C. 20001

Attorneys for Petitioners.

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,

Plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a class action by Regional Medical Programs (RMP's) seeking equitable relief, including declaratory judgment, injunction and mandamus. This action questions defendants' impoundment of funds appropriated for the RMP authority under Title IX of the Public Health Service Act, as amended, 42 U.S.C. §§229 *et seq.*, and other restrictions placed by defendants on the operations of RMP's. This matter came before the court upon cross motions for summary judgment. Upon consideration of the pleadings, motions, memoranda in support thereof, affidavits and exhibits, and the court having heard testimony and oral argument of counsel, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. *General Operation of the RMP's*

1. In general, the purpose of a Regional Medical Program is to provide a vehicle by which scientific knowledge can be more readily transferred to providers of health services and by so doing improve the quality of health care provided. Each regional Medical Program is administered by a grantee which is responsible for management of the RMP grant in such a manner as to implement the program established by the Regional Advisory Group (*i.e.* the organized voluntary body of health providers and consumers in each Regional Medical Program which has responsibility for program and project determinations and overall program direction) in accordance with Federal regulations and policies.

2. Once a Regional Medical Program has achieved operational status, grant funds are awarded for both program and operational activities. Program activities are those functions central to the RMP's operation. They encompass all activities performed by the Program staff, including administration, consultation, project development and management and evaluation. Operational projects are those activities which are supported totally or in part by RMP grant funds and are conducted by affiliated institutions and organizations. Each such activity must go through the Program's review process and be approved by the Regional Advisory Group.

3. The concept of time-limited support has always been central to RMP's. This concept embodies the idea of "seed money," or RMP investment in a specific activity only for the period of time necessary to get it initiated and accepted by the community. In the past it has been the policy of the Regional Medical Programs Service of HEW (RMPS) that RMP support to a particular project be

terminated after a three-year period, although allowances of up to 24 months after that time have been made to ensure orderly termination of projects. In the majority of cases, those projects from which RMP grant support has been withdrawn have been continued with funds from other sources such as State and local governments or private health care providers. Some projects are of course, deliberately discontinued by the RMP's with no further funding sought from within the community. Because the nature of the RMP program is to a large extent one of demonstration and testing, evaluation of some activities proves them to be either of little value in meeting health care needs or unsuccessful in terms of achieving their stated objectives. In other instances, projects may have time limited objectives which, once met, do not call for continuation.

4. Before February 1, 1973, RMP's operated on the basis of a "Mission Statement" published by the RMPS after approval by the National Advisory Council for Regional Medical Programs, copy of which is attached to the complaint in this action as *Exhibit 2*. This "Mission Statement" defined the scope of activities of RMP's and permitted them to engage in operational activities in the full range of purposes of the statute which authorized the creation of RMP's.

5. In the period immediately preceding February 1, 1973, the existing RMP's throughout the country were conducting large numbers of operational activities through their core staffs in cooperation with other organizations, institutions, and individuals, or by contracting for specific services with such other parties. These operational programs covered the full range of the RMP statutory purposes, including the effective delivery of primary health services, emergency medical services, and programs to regionalize care in the categorical

illnesses of heart disease, cancer, stroke, kidney disease and related diseases.

6. The various operational activities being carried on by RMP's prior to February 1, 1973 were complex in nature requiring the cooperation and joint efforts of many individuals and institutions. Considerable time was necessary to organize and set up these activities before they could become operational and further time was necessary for them to be productively completed. Almost all of the specific operational activities authorized by the RMP's were planned for and generally run for an operating period of between one and three years. As a general rule, each such specific activity was approved by the National Advisory Council for Regional Medical Programs (NACRMP).

7. In addition, 41 of the existing 53 RMP's had so-called "triennial status" prior to February 1, 1973. This status meant essentially that authority for the choice of specific operational activities and priorities was delegated to the Regional Advisory Group for each "triennial" RMP. Any operational activity within the scope of the statutory purposes and the general three-year program of the RMP as approved by the NACRMP could be authorized.

8. In reliance on this delegation of authority, triennial RMP's, as of February 1, 1973, had initiated and were conducting a large number of approved operational activities and had planned many others which were approved. RMP's without triennial status obtained required specific NACRMP and RAG approval for each operational activity.

9. The RMP Act was first enacted as Title IX of the Public Health Services Act, Pub. L. 89-239, 79 Stat. 926 *et seq.* on October 6, 1965. Appropriations were authorized for each fiscal year from 1966 through 1970.

In 1970 the Act was amended to authorize appropriations for fiscal 1971, 1973 and 1973. Act of June 30, 1970, Pub. L. 91-296 Title IV, 84 Stat. 352. Appropriation authority for fiscal 1974 was granted the RMP's by the Health Programs Extension Act of 1973, Pub. L. 93-45, Title I, §110, 87 Stat. 91, June 18, 1973. There is no present authorization for appropriations for RMP's after fiscal 1974.

II. *Fiscal 1973 Impoundment*

10. The authorized appropriation for fiscal 1973 was $250,000,000. $150,000,000 was actually appropriated for the RMP authority and activities in fiscal 1973.

11. In fiscal 1973, defendants made $55,358,000 available to the RMP authority, leaving an impounded balance of about $94,642,000.

12. Of the aforesaid $55,358,000, defendants "obligated" but have prevented the expenditure of $6,900,000 by the members of the plaintiff class. In addition, $2,450 of the $55,358,000 released by defendants was not "obligated" prior to June 30, 1973. Thus the total fiscal 1973 RMP impoundment is about $101,544,450.

III. *Fiscal 1974 Impoundments*

13. On July 1, 1973 the President approved Pub. L. 93-52, a Joint Resolution making continuing appropriations for a portion of fiscal 1974. For most of the first half of fiscal 1974, until December 19, 1973, the RMP appropriation was made by this Continuing Resolution, as extended, which established a rate of spending of $81,953,000, annualized, for RMP's. Such a rate would be slightly over $6,829,000 per month, or about $20,488,250 per quarter.

14. On August 28, 1973, the Department of Health, Education and Walfare allocated $17,100,000 to support Regional Medical Programs through December 31, 1973. In addition $2,000,000 was allocated for use through June 30, 1974 specifically to support identified pediatric pulmonary centers and $1,000,000 was allocated for the cost of direct operations performed by the Regional Medical Programs Service of the Department of Health, Education and Welfare. On September 7, 1973 these amounts were released by the defendants for spending by the RMP's. Thus, for the first half of fiscal 1974 the defendants released a total of $20,100,000 for RMP's.

15. On November 7, 1973 the RMPS received authorization to obligate a total of $44,900,000 for RMP grants and contracts during fiscal year 1974.

16. The authorized appropriation for fiscal 1974 was $159,000,000. On December 19, 1973, the President signed the fiscal 1974 Labor-HEW Appropriation bill, Pub. L. 93-192. Pub. L. 93-192 actually appropriates $81,953,000 for the RMP authority and authorizes the Executive to hold back not more than 5% of this amount. Accordingly, the fiscal 1974 RMP appropriation required to be obligated by the Executive Branch is $77,855,000.

IV. *As to Fiscal 1973 and Fiscal 1974 Impoundments*

17. A Treasury warrant covering funds previously withheld for fiscal 1973 and 1974 was requested and was received by the Department of Health, Education and Welfare on January 24, 1974. Because of the categories used and the sums stated the court cannot determine whether the withheld appropriations in this case are in fact covered in the warrant. The warrant was issued pursuant to Sec. 501, Pub. L. 93-245, as supplemented by Pub. L. 92-334, which provides for appropriation of

fiscal 1973 funds adjudicated to have been unlawfully impounded.

18. Historically, the annual appropriation for each RMP was made available for the entire fiscal year at the beginning of its operational year. This enabled RMP's to plan their year's operation and make arrangements and contracts with other cooperating institutions, groups and individuals. Defendants' actions in withholding release of fiscal 1973 and 1974 funds caused RMP activities to lose effectiveness and qualified staff personnel.

19. Defendant Ash through the Office of Management and Budget has taken part in the withholding of RMP appropriations.

20. Defendants maintain that the Executive Branch has the Constitutional power to withhold obligation and expenditure of appropriated funds regardless of statutory requirements that such funds be obligated and expended.

21. Appropriations for RMP's are covered by Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, as amended, 42 U.S.C.A. §201 note, a statute which is intended to prevent administration imposed freezes, reductions and roll-backs. This has been acknowledged by defendant Weinberger and by the President, as well as by defendant Ash's predecessor.

V. *Time Constraints on RMP Authority*

22. The Executive's fiscal 1974 Budget, submitted to Congress in January 1973, proposed phasing out RMP authority. No funds for the RMP program were included in the 1974 Budget request.

23. On February 1, 1973, defendants issued a telegram to all RMP's announcing termination of all grants on June 30, 1973, the date on which RMP

statutory authority was to lapse. Each RMP was required to complete a phase out plan by February 15, 1973 for submission to RMPS by March 15, 1973.

24. By directive dated February 11, 1973, defendants issued detailed instructions for effecting this phase out by June 30, 1973. Certain circumstances, however, justified continuation of some activities into fiscal 1974. In no event were activities of any kind to be continued beyond February 15, 1974.

25. Upon passage of the Health Services Extension Act, *supra,* ¶9 and the fiscal year 1974 Continuing Resolution, the Department of Health, Education and Welfare authorized the RMPS to negotiate with each RMP a level of support to assure its viability through September 30, 1973. Such level, however, could not exceed the actual average monthly expenditure for each RMP for the period April 1 through June 30, 1973.

26. On September 7, 1973, a Health, Education and Welfare directive advised all RMP's that they should not plan to make any expenditure of grant funds beyond June 30, 1974. The directive further required RMP's to engage only in operational activities which could be "productively completed" by the end of fiscal 1974.

27. This June 30, 1974 limitation remains in effect. *See* Letter to Jerome Wagshal from Harland F. Leathers, January 11, 1974. The effect of this policy taken together with the Department's partial funding for 1973 and 1974 tends to prevent or materially impede RMP's from operating at the program level anticipated by Congress.

VI. *Subject Matter Constraints on RMP Authority*

28. The September 7, 1973 directive also announced the following "Priorities and Options" for the funding of RMP activities for fiscal 1974:

A. *Strengthening Local Planning Processes*

This includes some financial as well as professional and technical assistance by program staff aimed at increasing provider inputs to State and areawide health planning efforts. Particular emphasis will be placed on: (1) assisting with implementation of the cost containment provisions (Section 1122) of the Social Security Amendments of 1972 and (2) planning for more effective community-based manpower development and utilization programs.

B. *Strengthening Local Quality Assurance Efforts*

Specific emphasis would be on: (1) assisting with the establishment of standards of speciality care in those areas of particular RMP competency and experience (*e.g.*, cardiovascular surgery, high voltage radiotherapy) and (2) assisting with the development of norms, criteria, standards and techniques associated with the implementation of the PSRO provisions of the Social Security Amendments of 1972. The RMP's will engage in *pilot efforts only* and will not be responsible for the actual operation of PSROs.

C. *Emergency Medical Services*

RMP's will continue their support of planning and development of certain components (*e.g.*, communications, coordinating councils) of either State or areawide EMs systems. Currently 28 RMP's are engaged in efforts along these lines as a result of $9 million in supplemental funding in June 1972.

D. *Kidney Disease*

Existing RMP efforts to develop a national network for dialysis and transplantation of patients with end-stage kidney disease, will be refocused toward expanding

present capabilities and provide start-up where none presently exists. This is necessary because of the increasing flow of kidney disease patients as a result of Medicare reimbursement for such patients, effective this July 1, as provided by Section 2991, Title II of the Social Security Amendments of 1972.

E. *Hypertension*

RMP's will, in cooperation with NHLI, seek to provide financial and other assistance in the design, development and implementation of community-based hypertension control programs. Major educational efforts for both physicians and the consumers would be emphasized, as well as assistance for those community screening efforts which have local support for continuation.

29. The statutory purposes of the RMP authority are as follows (42 U.S.C. §299):

> (a) through grants and contracts, to encourage and assist in the establishment of regional cooperative arrangements among medical schools, research institutions, and hospitals for research and training (including continuing education), for medical data exchange, and for demonstrations of patient care in the fields of heart disease, cancer, stroke, and kidney disease, and other related diseases;
>
> (b) to afford to the medical profession and the medical institutions of the Nation, through such cooperative arrangements, the opportunity of making available to their patients the latest advances in the prevention, diagnosis, and treatment and rehabilitation of persons suffering from these diseases;
>
> (c) to promote and foster regional linkages among health care institutions and providers so as to strengthen and improve primary care and the relationship between specialized and primary care; and

> (d) by these means, to improve generally the quality and enhance the capacity of the health manpower and facilities available to the Nation and to improve health services for persons residing in areas with limited health services, and to accomplish these ends without interfering with the patterns, or the methods of financing, of patient care or professional practice, or with the administration of hospitals, and in cooperation with practicing physicians, medical center officials, hospital administrators, and representatives from appropriate voluntary health agencies.

30. Grant awards were made to RMP's on October 1, 1973. They were not strictly limited to the five priority activities set forth in the September 7 directive. Activities identified exclusively for heart, cancer and stroke constitute approximately 10% of the total activities supported under those awards.

31. Despite the October 1, 1973 awards, plaintiffs have interpreted the "Priorities and Options" section of the September 7 directive as a restriction on the subject matter over which they are allowed to operate. They allege that as a result of the Health, Education and Welfare directive vital RMP operations have not been started or continued. *See* Affidavits of John Gordon Barrow, M.D., Director of the Georgia Regional Medical Program, September 17, 1973 and October 24, 1973, and attached Exhibits.

32. In late December, 1973, defendants notified members of the plaintiff class that fiscal 1974 funds could be rebudgeted for operational activities outside of the five options but within the 1971 Mission Statement. However, the defendants advised that high emphasis would continue to be placed on the five areas noted in the September 7 directive.

CONCLUSION OF LAW

1. This court has jurisdiction of this matter pursuant to 28 U.S.C. §§1331 and 1361.

2. This action presents a justiciable case and controversy as to fiscal 1973 and 1974. The matters at issue are issues of law. No non-justiciable political question is presented. Defendants herein are not immune from suit as agents of the sovereign.

3. The statutory authorization for Regional Medical Programs (RMP's) lies in the Public Health Service Act, as amended, Title IX, 42 U.S.C. §§299 *et seq.* This authorization was extended to fiscal 1974 by the Health Extension Act of 1973, Pub. L. 93-45, Title I, §110, 87 Stat. 91, June 18, 1973.

4. Fiscal 1973 appropriations for the RMP authority were made by Pub. L. No. 92-334, 86 Stat. 402, as extended, which appropriated sums in the amount of the lower of the House or Senate versions of H.R. 15417, 92d Cong. 2d Sess. The RMP fiscal 1973 appropriation was $150,000,000.

5. The obligation and expenditure of funds appropriated for the RMP authority for fiscal 1973 is subject to Section 601 of the Medical Facilities Construction and Modernization Amendments of 1970, Pub. L. No. 92-296, 85 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note (hereinafter "Sec. 601"). Sec. 601 was extended to fiscal 1974 by the Health Programs Extension Act of 1973, Pub. L. No. 93-45, 87 Stat. 91, and thereby applies to funds appropriated in fiscal 1974 for the RMP authority.

6. By enactment and extension of Sec. 601, the full obligation and expenditure of all funds appropriated for the RMP authority has been mandated by Congress for fiscal 1973 and 1974 without administration imposed freezes, reductions or rollbacks.

7. Until December 19, 1973, the fiscal 1974 Continuing Resolution, Pub. L. No. 93-52, mandated continuing obligation to the members of plaintiff class at the annualized rate of the lesser of the House or Senate versions of H.R. 8877, 93rd Cong. 1st Sess., and prohibited obligation at a lesser rate. This continuing rate for the RMP authority was $81,953,000 on an annualized basis.

8. On December 19, 1973, by the enactment of Pub. L. No. 93-192, $81,953,000 was appropriated for the RMP authority, and at least 95% of this amount has to be obligated by the Executive Branch. Therefore, the fiscal 1974 RMP appropriation which is required to be obligated by the Executive Branch is $77,755,000 at a minimum.

9. Sec. 601, and the fiscal 1973 and 1974 Continuing Resolutions, Pub. Laws No. 92-334 as extended and 93-52 as extended, each specifically remove the authority of the Director of the Office of Management and Budget under 31 U.S.C. §665, to reserve any sums appropriated under these laws. Said Director has no authority under law to hinder or limit the full obligation and allotment of said appropriations.

10. By virtue of Section 111 of Pub. L. No. 93-52, and by virtue of the Proviso of 31 U.S.C. §601(a) (2), this Court has jurisdiction to order that defendants be restrained and permanently enjoined from failing to obligate and expend such fiscal 1973 funds as defendants have unlawfully impounded. *Association of American Medical Colleges v. Weinberger,* Civil Nos. 1794-73 and 1830-73 (D.D.C. decided October 26, 1973.) Defendants herein have caused the dismissal of their appeals in these cases, *Association of American Medical Colleges v. Weinberger,* Nos. 73-2155 and 73-2156 (D.C. Cir., January 9, 1974) on the ground that they are prepared fully to comply with this court's order.

11. The fiscal 1973 appropriation at issue in this cause was required by law to be fully obligated, and expended. Said legal requirement was evidenced by duly enacted statutes. Accordingly, fiscal 1973 appropriations for the plaintiff class in this case may be deemed to have been fully obligated in law under 31 U.S.C. § § 200(a) (6) and (8), and 701(a) (2) prior to June 30, 1973. Moreover, by Sec. 501 of Pub. L. No. 93-245, approved January 3, 1974, the Congress has appropriated, "Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the Executive Branch of the United States Government in a civil action filed on or before June 30, 1974. . . ." This statute applies to the impounded fiscal 1973 appropriations in this case.

12. The conduct of defendants in failing and refusing to obligate and release to members of the plaintiff class the full amount of fiscal 1973 and 1974 funds duly appropriated by Congress for obligation to and expenditure by said class is unlawful, and such conduct is not authorized by Article II of the Constitution of the United States nor by any other law or authority.

13. The conduct of defendants in requiring members of the plaintiff class to engage only in operational activities which can be productively completed by June 30, 1974 is unlawful. By the extension of the RMP authority in the Health Programs Extension Act of 1973, Pub. L. 93-45, Congress has indicated that RMP operational activities should be permitted to proceed unhindered by such restrictions, and this should be done until Congress indicates a contrary intention. *Local 2677 v. Phillips,* 358 F. Supp. 60, 79 (D.D.C. 1973) (Jones, J.).

14. The conduct of defendants since February 1973 in maintaining a continuing program to effect the termination of the RMP authority in the face of clear

Congressional mandate that it be continued is unlawful. Defendants have no authority under Article II of the Constitution or any law to effect the termination of the RMP authority in the face of clear statutory intent and direction that it be continued.

15. Under the explicit command of Section 601, there is no remaining constitutional authority in the President and these defendants to terminate the statutory program in question here for reasons offered in the affidavits of Messrs. Stein, O'Neill and Pahl, which reasons are completely unrelated to the purposes of the Act, and therefore the defendants must process applications and exercise their discretion to review individual applications for RMP grants on their merits. *See Kendall v. United States ex rel. Stokes,* 37 U.S. 522 (1838); *Youngstown Sheet & Tube v. Sawyer,* 342 U.S. 579 (1952); *State Highway Commission v. Volpe,* 479 F.2d 1099 (8 Cir. 1973); *Local 2677 v. Phillips,* 358 F. Supp. 60 (D.D.C. 1973); *National Council of Community Mental Health Centers v. Weinberger,* 361 F. Supp. 897 (1973); *Association of American Medical Colleges v. Weinberger,* (two cases) Civil Action Nos. 1794-73 and 1830-73 (D.D.C. decided October 26, 1973); *Commonwealth of Massachusetts v. Weinberger,* Civil Action No. 1308-73 (D.D.C. decided July 26, 1973); *Commonwealth of Pennsylvania v. Weinberger,* Civil Action No. 1125-73 (D.D.C. decided November 21, 1973); *Commonwealth of Pennsylvania v. Weinberger,* Civil Action No. 1606-73 (D.D.C. decided December 11, 1973).

16. With respect to the plaintiffs' contentions relating to the 1971 Mission Statement and the "Priorities and Options" section of the September 7, 1973 directive, the court notes that the 1971 Mission Statement was issued in accordance with the defendants' responsibility to carry out and enforce Title IX of the Public Health Service Act.

By September, 1973 circumstances surrounding the operation of RMP's had so changed that the defendants deemed it appropriate to issue new guidelines in the form of the above-mentioned "Priorities and Options". Obviously, legitimate time and funding constraints necessitate lessened RMP activity. Therefore, the defendant administrators, if faced with such restraints, must be allowed to exercise their discretion in finding ways, such as establishing priorities, to maximize the effectiveness of the program. However, they must do so in a manner consistent with congressional, not self-imposed, time and budgetary limitations. In addition, the defendant administrators may not refuse to accept applications for programs in subject areas that are within the purposes outlined by the statute.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,

Plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, et al.,

Defendants.

FINAL ORDER

The Court having entered its Findings of Fact and Conclusions of Law this 7th day of February, 1974, it is hereby

ORDERED:

1. That defendants be, and hereby are, directed to take such administrative action as is necessary with such speed as is administratively feasible to implement the obligation to members of the plaintiff class herein, as heretofore certified (all regional medical programs operating pursuant to Title IX of the Public Health Service Act as amended, 42 U.S.C. §§299 *et seq.*), of the full appropriated sum for the Regional Medical Program (RMP) authority for fiscal 1973, to wit: $150,000,000 and shall obligate such amount pursuant to all requisite and proper reviews and approvals of specific operational activities.

2. Not later than June 30, 1974, defendants shall complete all necessary steps to obligate and grant to members of the plaintiff class herein such appropriated sums for the RMP authority for fiscal 1974, as are not authorized to be withheld by Pub. L. No. 93-192, and

shall obligate such amount pursuant to all requisite and proper reviews and approvals of specific operational activities.

3. Defendants shall obligate funds to members of the plaintiff class under terms and conditions and for expenditure during such time periods as were usual and normal prior to February 1973, when defendants began their unlawful impoundments. Defendants are permanently restrained and enjoined from requiring the members of plaintiff class to delay the expenditure of the aforesaid appropriated funds after the obligation thereof to such class members.

4. Defendants shall rescind in writing all directives inconsistent with this Order, and notify recipients of such directives of their recission.

5. Defendant Ash is permanently restrained and enjoined from taking or permitting to be taken, any action to hinder or limit the obligation, grant and expenditure of the full amounts of funds ordered obligated by this Order; and it is

FURTHER ORDERED and ADJUDGED that judgment pursuant to 28 U.S.C. §2201 consistent with the terms of the Findings of Fact and Conclusions of Law filed this date herein be entered in favor of the plaintiffs; and it is

FURTHER ORDERED that this Order shall not be stayed by this Court pending appellate review and plaintiffs shall have their normal costs for this litigations.

/s/Thomas A. Flannery

February 7, 1974
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC. *et al.*,

plaintiffs,

v.

THE HONORABLE CASPAR W. WEINBERGER, *et al.*,

defendants.

ORDER

The parties having agreed to amendment of this Court's Final Order of February 7, 1974, and members of the plaintiff class having been notified of the proposed amendment, and no objection having been made thereto by any such class member, it is this 22nd day of July, 1974,

ORDERED that

1. This Court's Final Order entered February 7, 1974 be and hereby is amended by the addition of the following two sub-paragraphs immediately following paragraph 1 of that Order:

A. Provided, however, the defendant Secretary of Health, Education, and Welfare, pursuant to the authority contained in Section 910 of the Public Health Service Act, 42 U.S.C. §299j, may obligate on or before 90 days after entry of this Order, not more than $5 million of the heretofore unobligated portion of the aforesaid fiscal year 1973 appropriation to grantees and contractors other than the Regional Medical programs constituting the plaintiff class. Such grants and contracts under

Section 910 of the Public Health Service Act may be made only for the following activities:

I. Obligations to augment current efforts in developing the state of the art of health planning with major emphasis on the development of criteria for expensive facilities and services such as radiation therapy and open-heart surgery and,

II. Obligations to the following grant and contract activities:

(1) Joint Commission on Accreditation of Hospitals

(2) American Heart Association–Joint Committee on Heart Disease Facilities

(3) Joint Committee on Stroke Facilities–American Neurological Association

(4) Metropolitan General Hospital, Cleveland, Ohio, Epidemiological Study of Kidney Diseases in Yugoslavia

(5) Connecticut State Medical Society Ambulatory Care Study

(6) Supplement to Connecticut State Medical Society Ambulatory Care Study

(7) Southwestern Pediatric Pulmonary Center, Albuquerque, New Mexico

III. No portion of the aforesaid funds to be obligated under Section 910 may be expended for purposes of planning the assumption of regulatory roles in the health field on the part of State governments, or any other activities not listed above. When the aforesaid $5 million is obligated defendants will make available documents showing the specified purposes for which the funds have been obligated.

B. Defendants are directed to implement the obligation of any portion of the aforesaid $5 million remaining unobligated 90 days after the entry of this Order, to members of the Regional Medical Program plaintiff class, pursuant to approved applications therefore, with such speed as is administratively feasible.

2. Defendants' Combined Motions for Additional Findings of Fact and Amendment of Order are withdrawn by agreement of the parties, upon entry of this Order. All other motions filed by the parties since February 7, 1974 are likewise withdrawn by agreement of the parties, upon entry of this order.

3. Upon the entry of this Order, all parties shall be deemed by their consent thereto to have waived any rights of appeal with respect to this Order and the Final Order entered February 7, 1974, as amended by this Order.

/s/ Thomas A. Flannery
United States District Judge

CONSENTED TO:

/s/Jerome S. Wagshal
JEROME S. WAGSHAL
Counsel for Plaintiffs
Suite 703
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: 202-331-0100

/s/Lawrence S. Ebner
LAWRENCE S. EBNER
Counsel for Defendants
Room 3618
Department of Justice
Washington, D.C. 20530
Telephone: 202-739-4260

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al, Plaintiffs,

v.

Honorable Caspar W. WEINBERGER et al., Defendants.

Civ. A. No. 1807-73

United States District Court, District of Columbia.

May 19, 1975

* * *

Jerome S. Wagshal, Washington, D.C., for plaintiffs.

Bruce E. Titus, U.S. Dept. of Justice, Civ. Div., Washington, D.C., for defendants.

MEMORANDUM OPINION

FLANNERY, District Judge.

This case is now before the court on application by plaintiffs' counsel, Jerome S. Wagshal, for the award of an appropriate attorney fee from the benefiting plaintiff class. The case originally involved defendants' impoundment of funds appropriated for the Regional Medical Programs' [RMP] authority under Title IX of the Public Health Service Act, as amended, 42 U.S.C. §299 et seq., and other restrictions placed by defendants on the operations of RMPs. The court, in a ruling entered February 7, 1974, as amended by Order entered July 22, 1974, declared the impoundment and other restrictions unlawful and ordered defendants to obligate essentially all of the impounded funds. The amounts released pursuant to the court's order exceeded one hundred million dollars.

This case proceeded to final judgment as a class action certified pursuant to rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure. Formal notice of the pendency of the class action was not given but it is undisputed from the record that all members of the class knew of the action. On several occasions Mr. Wagshal communicated with all members of the class regarding the case. When a final negotiated settlement of the action was reached in 1974, the court ordered that all members of the class be given actual notice of the court's rulings and of the proposed settlement. Class members were given the opportunity to comment upon the proposed settlement and to object to any of its provisions. No objections were noted and the final amended judgment was entered July 22, 1974. Thereafter, on October 7, 1974, plaintiffs' attorney filed the present application asking the court to award an appropriate attorney fee from the benefiting plaintiff class. Actual notice of this fee application was given to all members of the plaintiff class and all were invited to submit comments and/or to participate in the March 13, 1975 hearing on the petition.

Petitioner seeks a court order directing a fee to be paid him from the benefiting class. He asks particularly that the benefiting class be able to use grant funds in payment of the fee. Further, to the extent possible, petitioner suggests that his fee be paid out of those grant funds which remain unexpended. A large amount of these unexpended grant funds presently are held by defendants. Defendants oppose any fee which would be paid using grant funds, arguing that such a fee is barred by 28 U.S.C. §2412 (1970) and that such a fee would violate the Public Health Service Act itself. Petitioner of course disagrees but argues that if defendants prevail on their argument, then the court can and should order plaintiff class to pay petitioner a reasonable fee using non-grant funds. Defendants do not oppose payment of a fee using

non-grant funds so long as RMP operating efficiency is not significantly impaired. *See, e.g.*, Post-Hearing Supplement to Defendants' Opposition to Application by Plaintiffs' Counsel for the Award of an Appropriate Fee from the Benefiting Plaintiff Class at 1, filed April 7, 1975.

The court first will address the issue of the power of the court to award a fee from grant funds and also, in the alternative, will consider whether the court can order a fee *in personam* against plaintiff class members from non-grant funds. Since the court concludes in the affirmative on both of these issues, the court then will explain why this is a proper case for the court to exercise its equity powers and award a fee, and the amount of such a fee. Finally, the court will consider the mechanics of payment.

I. *Power of the Court to Award a Fee from Grant Funds.*

During the course of this litigation the court has had control over a huge fund of money which was the subject of the case on the merits. By its decision on the merits the court ordered defendants to obligate all of the impounded monies to RMPs except for $5,000,000 which could be obligated for different purposes. The court has never completely lost jurisdiction over this fund and indeed by Order of January 29, 1975, ordered up to $200,000 of unexpended grant and unexpended direct operation funds to be deposited to the registry of the court. Pursuant to that order $180,000 of unexpended direct operation funds have been obligated in the name and to the credit of the court. *See* Report to the Court, filed Feb. 28, 1975.

[1] There is clear precedent that the court may order an attorney fee paid from funds which the court

has ordered obligated to grantees. In National Council o: Community Mental Health Centers, Inc. v. Weinberger, 387 F. Supp. 991 (D.D.C. 1974), appeal pending, [hereinafter sometimes referred to as NCCMHC case] the court ordered a fee paid from grant funds, thereby rejecting the government's argument that such payment constitutes an attorney fee against the United States in violation of 28 U.S.C. §2412. The court finds that precedent pursuasive and notes with particular approval certain of the cases cited by that court. *See* Lafferty v. Humphrey, 101 U.S.App.D.C. 222, 248 F.2d 82, cert. denied, 355 U.S. 869, 78 S.Ct. 118, 2 L.Ed.2d 75 (1957); Emmet v. Whittier, 164 F.Supp. 563 (D.D.C. 1958), rev'd, 108 U.S.App.D.C. 191, 281 F.2d 24 (1960), cert. denied, 364 U.S. 935, 81 S.Ct. 380, 5 L.Ed.2d 367 (1961). The court also believes that the cases of Freeman v. Ryan, 133 U.S.App.D.C. 1, 408 F.2d 1204 (1968); Honda v. Mitchell, 136 U.S.App.D.C. 22, 419 F.2d 324 (1969), and Larionoff v. United States, 365 F.Supp. 140 (D.D.C.1973) support petitioner's position that funds held by the federal government may be used to pay an attorney fee. The court finds unpersuasive defendants' attempt to distinguish this line of cases by arguing that the monies in this case originally were appropriated by Congress and that the federal government has a substantial and continuing interest in these monies. First, there is no evidence that the above-cited cases rest on any such narrow distinction as whether the monies originally were appropriated by Congress. In *Lafferty* the monies finally were to be paid pursuant to a statute and certainly the government had a continuing interest in making certain that the statute's purposes were carried out. Nevertheless, the court allowed payment of substantial attorney's fees out of the funds held by the government. And in *Emmet* it is apparent that certain of the monies designated to pay the attorney's fee originally constituted appropriated

monies. *See* Whittier v. Emmet, 108 U. S.App.D.C. 191, 281 F.2d 24, 27 n. 5 (1960).[1]

The gist of petitioner's position is that when this court ordered defendants to obligate the RMP funds, these funds ceased to be funds of the United States such that an order to pay attorney fees out of the funds would be assessing fees against the United States. The Comptroller General in a series of rulings has held that funds which are awarded to a grantee lose their character as funds of the United States.

> It consistently has been held with reference to Federal grant funds that, when such funds are granted to and accepted by the grantee, the expenditure of such funds by the grantee for the purposes and objects for which made are not subject to the various restrictions and limitations imposed by Federal statute or our decisions with respect to the expenditure, by Federal departments and establishments, of appropriated moneys in the absence of a condition of the grant specifically providing to the contrary.

43 Comp. Gen. 697, 699 (1964). *See also* 36 Comp. Gen. 221 (1956). And in another situation, where grants were issued by the federal government to the states, the question was raised regarding whether the states, on using the money to purchase items, could pay the state sales tax. It was argued that payment of state sales tax would be illegal because it would be a state tax on the United States. The Comptroller General stated as follows:

> The States, therefore, in disbursing grant funds for purposes within the scope of the grant, may not

[1]While the Court of Appeals in *Emmet* reversed the District Court's award of attorney fees, it did so on the basis that it was not the proper case for such an award. Nothing in the case indicates that the District Court had no power to award a fee from those funds if the circumstances in the case had been different.

> be considered as "agents" of the United States; and, except for conditions specified by Congress in the grants, they are subject only to the restrictions imposed by State laws and regulations on the disbursement of other State funds.

37 Comp. Gen. 85, 87 (1957). When this court ruled that defendants' impoundment was illegal and that all impounded funds had to be obligated to grantees, the funds in question ceased to be funds of the United States such that an attorney fee might be construed as a fee against the United States. At that time they constituted grant funds and unless the Public Health Service Act bars use of the funds to pay an attorney fee, the court can order use of those funds to pay the fee in question. *See also* Celebrezze v. Sparks, 342 F.2d 286, 288 (5th Cir. 1965).

The court has examined the Public Health Service Act to determine whether Congress clearly restricted the use of grant funds for payment of legal services. *See* Mitchell v. Robert De Mario, 361 U.S. 288, 291, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960). As defendants admit, there is no clear legislative command which would restrict a court of equity from exercising its powers. Under the Act the grants are "to encourage and assist in the establishment of regional cooperative arrangements. . . ." 42 U.S.C. §299(a). And later the Act declares that the Secretary of Health, Education, and Welfare is to make grants "to assist in establishment and operation of regional medical programs. . . ." *Id.* §299d(a). The court agrees with petitioner that in face of defendants' illegal action in this case, use of grant funds to pay for an attorney is consistent with the Congressional directive to assist in establishment and operation of the RMPs. Defendants, however, cite their regulations which purport to limit the purposes for which grantees can use grant money. *See* 42

C.F.R. §54.401 et seq. The court perceives two answers to this defense. First, the regulations themselves are ambiguous and thus do not, even if they could, clearly and validly restrict the court's equity jurisdiction. More important, if the regulations are construed to bar use of grant funds for these legal expenses, the regulations are invalid. Congress, when faced with defendants' illegal impoundment, took action to assure that no appropriations lapsed during the impoundment. Congress provided:

> Any funds necessary to be appropriated for full obligation of a fiscal year 1973 appropriation determined to have been unlawfully impounded by the executive branch of the United States Government in a civil action filed on or before June 30, 1974, are hereby appropriated out of any money in the Treasury not otherwise appropriated.

Pub.L. No. 93-245, §501, 87 Stat. 1071 (1973). Clearly, Congress anticipated the use of civil litigation to end some of the illegal impoundments. Congress must have expected some if not all of these civil cases to be brought by the grant recipients who had been denied the monies appropriated by Congress. It would be absurd to think that Congress anticipated civil litigation by grantees similar to plaintiffs in this class action but would forbid these grantees to pay for the cost of an attorney to bring such an action. *See* Hall v. Cole, 412 U.S. 1, 13-14, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). The court will presume no such absurd result. Accordingly, the court finds no bar to class members' use of grant funds in payment of the attorney fees in question.

II. *The Court has Power to Enter an In Personam Order Against Members of Plaintiff Class Ordering Payments of Attorney Fees.*

[2] In the proceeding on the merits the court certified the case as a class action pursuant to rules 23(b)(1) and 23(b)(2) of the Federal Rules of Civil Procedure. Members of plaintiff class have received two formal court-ordered notices: one of the settlement constituting an amendment to the final judgment and one of petitioner's application for attorney fees. The class also has received considerable direct communication from Mr. Wagshal. In the case on the merits the court had *in personam* jurisdiction over each member of the plaintiff class—that determination is implicit in this court's certification of the class. The question arises, however, whether the *in personam* jurisdiction continues when this proceeding for attorney fees is commenced. The court concludes that *in personam* jurisdiction is present. That *in personam* jurisdiction does not derive from the fact that Mr. Wagshal presently adequately represents the class members; he does not since he now seeks a fee directly from them. *See NCCMHC* case, *supra.* However, having *in personam* jurisdiction over all plaintiffs in the case on the merits and having given each RMP actual detailed notice of the pendency of the fee proceeding and having given each RMP notice of its right to participate in this proceeding, the court holds that due process has been satisfied and that the court has valid *in personam* jurisdiction over each class member and can order each to pay a fee directly to Mr. Wagshal. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). This *in personam* jurisdiction rests on the fact that each RMP has been before the court on the merits, has benefited from the court's order requiring obligation of the impounded funds, and has been given

notice and an opportunity to participate in the instant proceeding.

III. *This is a Proper Case for the Court to Award Attorney Fees.*

[3,4] This action falls within one of the well-settled exceptions to the American rule of denying attorney's fees as part of the costs of litigation. Carefully enunciated by the Supreme Court in Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), Mills v. Electric Auto-Lite, Co., 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), and many other cases, this exception seeks to spread the cost of the plaintiff's efforts proportionately among those who benefited. This exception is not narrowly founded on any rigid set of facts which must be found but rather "is part of the historic equity jurisdiction of the federal courts. . . . [and] is part of the original authority of the chancellor to do equity in a particular situation." Sprague v. Ticonic National Bank, *supra*, 307 U.S. at 164, 166, 59 S.Ct. at 779. The recent Supreme Court decision in Alyeska Pipeline Service Co. v. Wilderness Society, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), while sharply limiting the private attorney general exception to the American rule, did not limit the exception applicable in this case. In this action the National Association of Regional Medical Programs was organized specifically to prosecute the case on the merits. To assure standing, two RMPs were named as plaintiffs also. However, there was an extreme lack of money to prosecute the case. Mr. Wagshal took the case, agreeing to receive a $35 per hour "front fee" from the National Association, with the express understanding that, if successful, he would then petition the court for a fee to be paid from the benefiting class. The $35 per hour fee that has been paid to Mr. Wagshal was not paid by the benefiting class; rather, that

fee was collected as donations from the professional staff of the various regional medical programs. Clearly, this is a case where a plaintiff class—the 53 RMPs—have benefited from litigation brought on their behalf but for which they have not paid. Because of the recovery which they have received, an appropriate fee can be paid, providing reasonable compensation to Mr. Wagshal and also reimbursing the National Association of Regional Medical Programs for the payments it has made. *See also* Lindy Bros. Builders, Inc. v. American R. & S. San. Corp., 487 F.2d 161, 165-66 (3d Cir. 1973). In the following section analysing the factors relevant to award of an attorney fee, the benefits and services rendered will become more apparent, further justifying the court's exercise of its equitable powers in this exceptional case.

IV. *The Proper Fee in this Case.*

The court first must resolve a problem which apparently has perplexed many district judges in ruling upon attorney fee applications: what is the proper standard to apply. In this case petitioner argues vigorously that the settled rule in this jurisdiction is that the court apply a *quantum meruit* approach for fees paid in complex class actions. However, the law certainly is something less than clear in this regard, as evidenced by petitioner having devoted approximately 80 pages of legal memoranda to this subject. The cases in this jurisdiction are inconsistent. In some older cases the Court of Appeals implicitly has endorsed an approach which, while considering to some extent the time and effort involved, focuses most closely on the benefits conferred and grants counsel a percentage of those benefits. *See, e.g.,* Honda v. Mitchell, 136 U.S.App.D.C. 22, 419 F.2d 324 (1969); Freeman v. Ryan, 133 U.S.App.D.C. 1, 408 F.2d 1204 (1968); Bakery & Confectionery Workers International Union v. Ratner, 118 U.S.App.D.C. 269, 335 F.2d 691

(1964). Other recent cases have merely listed without extensive analysis the factors a district judge is to consider, including both the time and labor involved and the benefits conferred. *See, e.g.*, Evans v. Sheraton Park Hotel, 164 U.S.App.D.C. — 503 F.2d 177, 186-188 (1974); Wilderness Society v. Morton, 161 U.S. App.D.C. 446, 495 F.2d 1026, 1036-37 (1974) (en banc), rev'd, — U.S. —, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Finally, recently both the district court and the Court of Appeals have endorsed an approach in a number of cases where time obviously was the principal factor in the court's analysis. *See* Kiser v. Huge, — U.S.App.D.C. —, 517 F.2d 1275 (1974) (en banc); Kiser v. Miller, 364 F.Supp. 1311 (D.D.C.1973), modified on other grounds, Kiser v. Huge, *supra;* National Council of Community Mental Health Centers, Inc. v. Weinberger, 387 F.Supp. 991 (D.D.C.1974), appeal pending; Larionoff v. United States, 365 F.Supp. 140 (D.D.C.1973). Further, two Circuits recently have adopted an approach to class action fees which emphasizes the time and hourly rate of the attorney as the focus of the court's attention. *See* City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974); Lindy Bros. Builders, Inc. v. American R. & S. San. Corp., 487 F.2d 161 (3d Cir. 1973). The *Lindy* case, together with the District Court's opinion on remand, 382 F.Supp. 999 (E.D.Pa. 1974), provides the most thorough explanation of the proper procedure for calculation of attorney fees which this court has discovered. One of the most important reasons for the detail set forth in the *Lindy* opinions was the appellate court's desire to have a clear and well-explained record upon which to evaluate the district court's discretionary exercise of equitable powers. A similar concern for the need for careful and clear district court explanation of its attorney fee calculations recently has been expressed by this Circuit. *See* Evans v. Sheraton Park Hotel *supra.*

[5-7] This court is in full agreement with those recent decisions which emphasize that the district court, in exercise of its equitable power to award attorney fees in complex class litigation, must set forth carefully the factors considered in determining the amount of the fee. Further, this court also agrees that in determining the fee the court must seek to afford reasonable compensation to the attorney, mindful that there has been great criticism of attorneys for excessive fees in contingent fee situations. Kiser v. Miller, *supra* at 1315. *See also* "Control of Attorneys' Fees and Expenses in Class Actions," Manual for Complex Litigation, 1 Moore's Federal Practice §1.47 (2d ed. 1974). In litigation of this sort the counsel should not necessarily receive compensation similar to that received in antitrust or securities litigation. Rather, in public interest cases such as the instant one, the merits of each case must be judged individually. *See* Kiser v. Miller, *supra* at 1318. The court concludes that an approach focused primarily on *quantum meruit* principles is unjustified in this case. Rather, an approach combining factors from the *Kiser* and *Lindy* opinions and focusing primarily on the time and labor involved offers the proper procedure for determining the attorney fee in question.

The court's approach will be along the following lines. The court will analyze first the type of work involved in the case and the number of hours expended by Mr. Wagshal on various efforts. The court then will consider the proper hourly fee to be charged for this work. After arriving at a strictly hourly figure, the court then will consider what amount, if any, should be added to petitioner's compensation, based particularly on the contingent nature of this litigation, the benefits conferred on plaintiff class, the service rendered to the public, the difficulty of the issues involved and petitioner's skill in dealing with them, and the other factors set forth by the

Court of Appeals in Evans v. Sheraton Park Hotel, *supra*. This approach will assure reasonable but not excessive compensation for Mr. Wagshal and should encourage similar service in the future.

It is undisputed that Mr. Wagshal spent at least 602 hours on the merits of this case.[2] Mr. Wagshal has presented logs of this time which he used to bill the National Association at the rate of $35 per hour. Mr. Wagshal claims that the amount of time should be increased by one-third to 800 hours because of extra time he spent on the case and for which he did not bill. Mr. Wagshal has explained this extra time as follows. His paying client, the National Association, had only limited resources to finance this litigation and Mr. Wagshal knew that if the billings became too great, they would exhaust these limited resources. Thus, Mr. Wagshal did not bill his clients for much of the time he spent on the case and thus this time does not appear in his time logs. He emphasizes that since he expected, if victorious, to apply to the court for an attorney fee on a contingent fee basis, that it was unnecessary to keep a careful log of all this time. The 600 hours which Mr. Wagshal billed constituted a sufficient front fee for the litigation; he expected to get the rest of any fee on the basis of a court award if victorious. In the future the court would expect any attorney to keep careful records of all hours expended. However, at the time of this litigation, it generally was not expected that attorneys seeking a contingent fee in class litigation keep meticulous track of their hours. The court finds that Mr. Wagshal did keep thorough records of at least 600 hours. Under these circumstances, the court finds it appropriate to increase the number of hours

---

[2]Consideration of compensation for the time spent in preparation of the present fee application will be dealt with later in this Memorandum Opinion.

Mr. Wagshal spent on the merits of this action from 600 to 700.

Mr. Wagshal has been a member of the Bar since 1953. He had extensive experience with the Antitrust Division of the Justice Department and from mid-1970 to mid-1973 was a partner in the law firm of Dickstein, Shapiro, and Galligan. Since that time he has practiced either alone or with one other attorney. It is difficult to compute precisely what Mr. Wagshal's normal hourly rate is because almost all of his work in private practice has been on a contingent fee basis. On occasion he has undertaken work at $75 per hour. Presently, he is counsel in certain antitrust matters at a fee of $75 per hour plus a substantial additional amount if he should win. Mr. Wagshal estimates that his normal fee on an hourly basis would be between $100-$125 per hour. It must be noted, however, that Mr. Wagshal, practicing alone, was required to address a wide range of issues, varying from extremely complex to simple. Under all of the circumstances the court concludes that a reasonable hourly rate for all of the work Mr. Wagshal performed on the merits of this case is $70 per hour. Thus, for 700 hours spent on the merits of this case, the time factor in the compensation will be $49,000.

[8] Petitioner claims to have spent 475 hours in preparation of this fee application. First, petitioner is entitled to compensation for the reasonable time and effort in petitioning the court for a fee. *See* National Council of Community Mental Health Centers, Inc. v. Weinberger, *supra* at 996; Lindy Bros. Builders, Inc. v. American R. & S. Corp., 382 F.Supp. 999 (E.D.Pa.1974). The court finds that 475 hours for preparation and prosecution of the attorney fee application is excessive. The court does not doubt that Mr. Wagshal expended that much effort and does not doubt that on certain

issues, particularly those dealing with the power of the court to award fees from grant funds, considerable effort was required. However, on many issues, particularly those relating to the proper legal standards in computation of attorney fees, the court finds that petitioner's papers have been excessive and repetitive. Further, certain issues were neither novel nor complex and much research on some issues was done previously in the NCCMHC case. Under these circumstances, the court concludes that the proper hourly rate for work on petitioner's fee petition is $50 per hour. Further, the court has reduced the number of hours for which compensation will be paid from 475 to 150. These reductions reflect the amount of effort and skill necessarily expended in seeking this fee. *See* Larinoff v. United States, *supra*; Kiser v. Miller, *supra*. Thus, the time compensation factor regarding the attorney fee application is $7500.

[9] The court next must determine what incentive fee or bonus, if any, is appropriate in this case. In resolving this question the court considers the following factors: the benefits conferred upon the class, the benefits conferred upon the public, the contingent nature of the fee arrangement, the difficulty of the issues and the skill demonstrated, the preclusion of other employment, the incentive fee or bonus in similar cases, and the other factors enunciated in Evans v. Sheraton Park Hotel, *supra*.

First, and perhaps most obviously, Mr. Wagshal has helped to confer a very substantial benefit upon the public in obtaining a declaration that the impoundment of one hundred twenty-five million dollars of funds destined for the RMP's was illegal and had to be stopped. Further, petitioner has greatly benefited the plaintiff class through release of over one hundred million dollars of impounded funds. Without this money most of the

RMPs would have ceased to exist. To an extent petitioner did not himself create the amount of benefit since Congress had appropriated the monies in question. However, in post-February 1974 litigation petitioner materially assisted in preserving the benefits for the class by preventing defendants from diverting $30 million for other purposes. Further, petitioner benefited the plaintiff class by helping to assure continuation of their authority and operations, by assisting in obtaining funding during continuing resolutions, and by preventing the lapse of funds.

This impoundment case presented novel and complex issues which required considerable skill and diligence to resolve. Mr. Wagshal devoted much effort to structuring this case as a class action, indeed assisting in the formation of the National Association. He was laboring under an extreme time pressure constraint since there was danger that the impounded funds would lapse if preliminary relief were not obtained. When Mr. Wagshal was denied a temporary restraining order on September 28, 1973, he immediately instituted an emergency appeal and obtained injunctive relief for his clients in an extraordinary Sunday session before the Court of Appeals. Between September 30, 1973 and the entry of a final order on February 7, 1974, Mr. Wagshal was involved in briefing complex motions for summary judgment which involved great skill. It is to Mr. Wagshal's credit that he was successful in his efforts and obtained essentially full relief for his clients. After entry of the final order compelling obligation of all impounded funds, Mr. Wagshal was forced to litigate against efforts by defendants to divert $30 million to other purposes. This effort, involving extensive discovery and new, complex issues not raised earlier in the litigation, again required a great deal of skill and perserverance. In the end Mr.

Wagshal succeeded in preserving all but $5 million of the amount defendants wanted to divert to other purposes and even that $5 million was allowed to be diverted only to specific other purposes. The foregoing is only a brief summary of the efforts of Mr. Wagshal in the merits of this litigation. They are set forth in greater detail in the affidavits and exhibits of this case. In sum, Mr. Wagshal has demonstrated a high degree of skill and has acted in the highest traditions of the Bar of this court in faithfully and doggedly representing his clients and bringing this case to a successful resolution.

In undertaking this work which so furthered the public interest the court believes it significant that when the RMPs looked for counsel to assist in opposing the illegal impoundment, no other counsel could be found. The RMPs sought assistance from various other counsel but none would accept the work because of the RMPs' inability to pay and the contingent nature of the litigation. Indeed, from the point of view of the start of the litigation—and Mr. Wagshal became involved initially in June, 1973—it was not at all obvious that the impoundments were illegal. Indeed, petitioner sought and initially was denied temporary relief and obtained the anti-lapse relief only by taking an emergency appeal. Clearly, this case at its outset presented real doubts as to ultimate success. Under petitioner's arrangement with his clients, he only would seek a fee from the RMPs if successful on the merits. Finally, in agreeing to take this case with a highly contingent outcome, petitioner has been denied the opportunity to take certain other cases because of the workload imposed by this case.

[10] Given the preceding factors and particularly the great benefits conferred on the public, the great benefits conferred on plaintiff class, the skill demonstrated, and the contingent nature of the litigation at the outset, the

court concludes that a substantial bonus is in order. In the NCCMHC case, a case involving fewer complex issues and taking less than half the time to resolve, Judge Gesell granted a bonus of 30 percent of the hourly fee. In other cases in this Circuit where issues were neither complex nor novel and required no great skill, incentive bonuses of 10 percent still have been approved. *See* Kiser v. Miller, *supra*; Larinoff v. United States, *supra.* In *Lindy, supra,* on remand, where the court determined that the attorneys had demonstrated great skill, faced real contingency, and had conferred great benefit upon the plaintiff class, the court ordered a 100 percent incentive bonus. In this case, having many of the factors cited in *Lindy,* and after considering all of the foregoing, the court concludes that a 100 percent incentive bonus is in order for Mr. Wagshal for his work on the merits of the case; no incentive bonus is in order for his work on the fee application. This brings total compensation to the following:

hourly compensation for work on merits	$49,000
hourly compensation for work on fee	7,500
incentive bonus	49,000
	$105,500

In reaching this fee determination the court wishes to reiterate certain factors which it considers extremely important. First, in this case the court awards a fee which provides a fair prospect of remuneration to those members of the Bar who participate in public interest litigation on behalf of plaintiff classes. At the hearing on this fee application there was considerable evidence concerning the reluctance of members of the Bar to prosecute these cases. At the same time, the court is mindful that any fee award must not only satisfy the

need of the Bar for adequate remuneration, it also must not appear to be unreasonably great to the public. When an attorney represents a class in public interest litigation, he represents a great deal more than his own interest. The Manual for Complex Litigation states as follows:

> Once adequate compensation sufficient to provide the motive for representation of classes is provided, no further incentive is required. In this connection, while any fee allowed in the case of a settlement or recovery through litigation may constitute a percentage of the total amount recovered, the reasonableness of the fee arrived at should not rest primarily on the selection of a percentage of the total recovery. Although the results obtained in representing the class should be given consideration as provided in the Code of Professional Responsibility, there should also be an emphasis upon the time and labor required and the effect of the allowance on the public interest and the reputation of the courts. In no event should representation of a judicially determined class be allowed on the same basis as in a contingent fee contract between competent contracting counsel and client.

1 Moore's Federal Practice, *supra* at 64. It is the court's conclusion that the fee arrived at in this case does provide sufficient motivation for representation of classes while at the same time it also can withstand public scrutiny.

V. *Mechanics of Payment.*

There currently is $180,000 of unexpended direct operations funds deposited in the name and to the credit of the court. The court, as requested by petitioner, has decided that an appropriate attorney fee—$105,500—should be assessed against the benefiting class. The benefiting class members shall be ordered to pay Mr. Wagshal their *pro rata* share of the attorney fee. At the

same time defendants shall be ordered to make available to plaintiff class members a similar amount of the unexpended funds currently held by defendants. This $105,000 received by the class members will assure that the RMP programs shall continue their programs with full effectiveness. The court finds it fully consistent with its judgment on the merits of this case to order defendants to obligate an additional $105,500 to the RMPs. This money, obligated originally to direct operations, was not needed for direct operations and thus the funds should go to the RMPs for their much-needed operations. The expenses of this litigation were unexpected but necessary expenses of the RMPs. Since unexpended grant funds remain available, it is proper that each RMP's grant be enlarged by the amount of its unexpected legal expense.

The court will order that defendants make available to the RMPs the $105,000 within 30 days of the filing of this Order. Also, within 30 days of this Order each RMP shall remit its *pro rata* share of the attorney's fee to Mr. Wagshal. This payment by benefiting class members shall be made to the extent possible from non-grant funds.[3] If a grantee does not have sufficient nongrant funds to make its *pro rata* payment, it may then use grant funds. When Mr. Wagshal has received full payment, he will reimburse the National Association of Regional Medical Programs for the fees he has received from it.

---

[3]Since the court in awarding this attorney fee is exercising its equitable powers, the court deems it desirable, to the extent possible, to avoid objection by all parties to this fee award. As stated previously, defendants do not object to any fee payment from nongrant funds so long as an RMP's operating effectiveness is unimpaired. The fee payment in this case should meet those objections, not hinder any RMP, and provide reasonable compensation to petitioner.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1807-73

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., et al.,
Plaintiffs,

v.

HONORABLE CASPAR W. WEINBERGER, et al.,
Defendants.

ORDER

The court having entered its Memorandum Opinion in the above-entitled matter this 19th day of May, 1975, it is hereby

ORDERED:

1. Petitioner is hereby awarded the sum of $105,500 as a fee for services rendered the benefiting members of the plaintiff class in this cause.

2. Each member of the plaintiff class may, in accordance with established procedure, draw its *pro rata* share of $105,500 as shown on Appendix A to this Order. Defendants shall make this money available within thirty (30) days of this Order and shall charge such drawings to the account heretofore established in the name and to the credit of this court by Order entered January 29, 1975.

3. Within thirty (30) days of the entry of this Order, each member of the plaintiff class shall pay directly to petitioner, Jerome S. Wagshal, the sum set out on Appendix A to this Order. Such payment shall be made

to the extent possible from funds other than grant funds and to the extent necessary from program income which class members are entitled to retain for their own use under 45 C.F.R., Subtitle A, Subpart F, §§74.40 *et seq.*; provided, however, that any member of the plaintiff class which does not have available to it such non-grant related funds or program income, or which has such funds in a lesser amount than provided in Appendix A, may then use grant funds to complete payment.

4. Petitioner shall, upon the receipt of the full amount of the award provided in paragraph 1, above, issue and deliver his check in the sum of $21,070.00 to plaintiff National Association of Regional Medical Programs by way of refund of the fees heretofore paid him by said plaintiff association.

5. Within seven (7) days of the date of the entry of this Order, petitioner shall cause a copy of this Order and the accompanying memorandum Opinion to be mailed, return-receipt requested, to each member of the plaintiff class.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

	Total Funds Released	Percent of Total Released	Amount Each RMP May Draw as Additional Grant from HEW	Pro Rata Share Fee Award Each Must Pay Petitioner
California	$12,015,911	9.58	$10,106.90	$10,306.90
New Jersey	4,404,281	3.51	3,703.05	3,703.05
Mississippi	4,331,983	3.45	3,639.75	3,639.75
New York Metro	4,015,051	3.20	3,376.00	3,376.00
Georgia	3,948,554	3.15	3,313.25	3,323.25
Illinois	3,732,907	2.98	3,143.90	3,143.90
Memphis	3,637,152	2.90	3,059.50	3,059.50
Floridq	3,430,782	2.74	2,890.70	2,890.70
Greater Del. Valley	3,350,012	2.67	2,816.85	2,816.85
Michigan	3,313,883	2.64	2,785.20	2,785.20
Intermountain	3,027,334	2.41	2,542.55	2,542.55
Alabama	3,010,387	2.40	2,532.00	2,532.00
Missouri	2,991,025	2.39	2,521.45	2,521.45
Tennessee Mid-South	2,843,631	2.27	2,394.85	2,394.85
North Carolina	2,808,946	2.24	2,363.20	2,363.20
South Carolina	2,795,133	2.23	2,352.65	2,352.65
Washington/Alaska	2,715,195	2.17	2,289.35	2,289.35
Texas	2,655,682	2.12	2,336.60	2,336.60
Tri-State	2,628,750	2.10	2,215.50	2,215.50
Mountain States	2,529,325	2.02	2,131.10	2,131.10
Ohio Valley	2,427,951	1.94	2,046.70	2,046.70
Wisconsin	2,364,096	1.89	1,993.95	1,993.95
Kansas	2,334,927	1,86	1,962.30	1,962.30
Virginia	2,141,148	1.71	1,804.05	1,804.05
Arkansas	2,103,086	1.68	1,772.40	1,772.40
Northlands	2,088,809	1.67	1,761.85	1,761.85
Western Pennsylvania	2,050,471	1.63	1,719.65	1,719.65
Maine	2,045,753	1.63	1,719.65	1,719.65
Colorado/Wyoming	2,004,183	1.60	1,688.00	1,688.00
Hawaii	1,875,685	1.50	1,582.50	1,582.50
New Mexico	1,860,429	1.48	1,561.40	1,561.40
Albany	1,770,388	1.41	1,487.55	1,487.55
West Virginia	1,754,043	1.40	1,477.00	1,477.00
Lakes Area	1,754,043	1.40	1,477.00	1,477.00
D.C. Metro	1,568,787	1.25	1,318.75	1,318.75
Rochester	1,453,152	1.16	1,223.80	1,223.80
Indiana	1,420,994	1.13	1,192.15	1,192.15
Oklahoma	1,417,158	1.13	1,192.15	1,192.15
Oregon	1,401,477	1.12	1,181.60	1,181.60

	Total Funds Released	Percent of Total Released	Amount Each RMP May Draw as Additional Grant from HEW	Pro Rata Share Fee Award Each Must Pay Petitioner
Connecticut	1,400,248	1.12	1,181.60	1,181.60
Arizona	1,399,450	1.12	1,181.60	1,181.60
Iowa	1,376,025	1.10	1,160.50	1,160.50
Northern New England	1,365,502	1.09	1,149.95	1,149.95
Central New York	1,276,796	1.02	1,076.10	1,076.10
Louisiana	1,206,647	.96	1,012.80	1,012.80
Bi-State	1,195,353	.95	1,002.25	1,002.25
Nebraska	1,072,313	.85	896.75	896.75
Nassau-Suffolk	1,003,040	.80	844.00	844.00
Puerto Rico	989,462	.79	833.45	833.45
Susquehanna Valley	905,631	.72	759.60	759.60
South Dakota	833,654	.66	696.30	696.30
Maryland	729,634	.58	611.90	611.90
North Dakota	712,061	.57	601.35	601.35

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1615

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC. ET AL.,

v.

HONORABLE F. DAVID MATHEWS, INDIVIDUALLY AND AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL., APPELLANTS

No. 75-2001

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC. ET AL.,

v.

HONORABLE F. DAVID MATHEWS, INDIVIDUALLY AND AS SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL., APPELLANT

JEROME S. WAGSHAL, APPELLANT

Appeals from the United States District Court for the District of Columbia

(Civil 1807-73)

Submitted without argument December 2, 1976

Decided December 13, 1976

Rex E. Lee, Assistant Attorney General, *Earl J. Silbert*, United States Attorney, *Leonard Schaitman* and *Eloise E. Davies*, Attorneys, Appellate Section Civil Division, Department of Justice, were on the brief for appellant, Secretary of Health, Education and Welfare.

Jerome S. Wagshal, was on the brief for appellees.

Before: TAMM, MACKINNON, and ROBB, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: The facts and issues of this case are closely analogous to those found in *National Council of Community Mental Health Centers, Inc. v. Mathews*, Nos. 75-1335, -1353 (D.C. Cir. Nov. 9, 1976) (hereinafter *NCCMHC*). Two basic issues are presented here. The first concerns the district court's award of an attorney's fee out of federal grant funds; the second involves the power of the district court to award that fee against the individual class members. As we find that the *NCCMHC* decision is controlling here, we reverse the judgment of the district court.

I. FACTUAL BACKGROUND

As in *NCCMHC*, this case arises out of a district court order awarding Jerome Wagshal an attorney's fee for successfully prosecuting a class action claim against the Department of Health, Education and Welfare (HEW) which resulted in the release of illegally impounded funds exceeding one hundred million dollars.[1] The funds involved were appropriated by Congress for the Regional Medical Programs (RMPs) under two amendments to

[1] The unreported decision on the merits in *National Ass'n of Regional Medical Programs, Inc. v. Weinberger*, Civil Action No. 1807-73, was entered on February 7, 1974 and amended by order on July 22, 1974.

the Public Realth Service Act, 84 Stat. 1298 (1970) and 87 Stat. 93 (1973), *as amended* 42 U.S.C. § 299a (Supp. V, 1975). The purpose of these grants is to assist in the establishment of regional cooperative arrangements among medical institutions for research and training in the fields of heart disease, cancer, stroke, and kidney disease. After plaintiffs' success on the merits, the district court ordered the defendant-Secretary of HEW to deposit up to $200,000 of unexpended funds into the registry of the court.[2] Pursuant to this order HEW obligated $180,000 of unexpended direct operations funds.[3] The disposition of these funds is now at issue.

The district court determined that it had power to award a fee from grant funds because all of the grant funds were obligated to the grantees pursuant to its decision on the merits and therefore the government was nothing more than a stakeholder of these monies.[4] It reasoned that as long as the funds belonged to the grantees, an award of attorney's fees was not barred by 28 U.S.C. § 2412 (1970).[5] As precedent for its ruling, the

[2] The fee award case is reported. National Ass'n of Regional Medical Programs, Inc. v. Weinberger, 396 F. Supp. 842 (D.D.C. 1975) (hereinafter NARMP v. Weinberger).

[3] *Id.* at 844.

[4] *Id.* at 844-45.

[5] Title 28 U.S.C. § 2412 (1970) provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States.

(Emphasis added).

court relied on *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 387 F. Supp. 991 (D.D.C. 1974), which we recently overruled in *NCCMHC*, *supra*.

In addition to finding that it had authority to award an attorney's fee from grant funds, the district court held that it had in personam jurisdiction over the individual RMP class members, and thus could order each member to pay the designated fee. The court based its in personam jurisdiction on the fact that each class member had litigated the merits of the case before the court and had benefitted therefrom, and in addition, that each had had actual notice of the fee proceeding and an opportunity to participate in it.[6]

In view of its finding that it had in personam jurisdiction over the class as well as authority to compel disbursal of grant funds for attorney's fees, the district court devised a somewhat convoluted formula for the payment of such fees. It first assessed an attorney's fee amounting to $105,500 against the benefitting class. Each member was to pay its *pro rata* share ostensibly from non-grant funds but if these proved insufficient, grant funds could be used to make up the difference. The court then ordered HEW to simultaneously supplement each RMP's grant by transferring from unexpended direct operations funds an amount identical to the legal expense incurred by each.[7] Without waiting for this court to make a determination as to the legality *vel non* of the

[6] NARMP v. Weinberger, *supra* at 846-47.

[7] *Id.* at 852.

fee award from grant funds, the plaintiff class proceeded to pay Wagshal's fee mostly from such monies; this fee, Wagshal now contends, was not commensurate with the value of his services. NARMP Reply Brief at 3 n.5. Reimbursement to the class by HEW from the unexpended direct operations funds has been stayed pending the outcome of this appeal.

II. The Source of the Fee Payment

The first problem confronting us is to determine exactly what funds are actually being used to pay the attorney's fee. As 28 U.S.C. § 2412 prohibits an award of attorney's fees against the government, we must unravel the payment scheme devised by the district court in order to uncover the true source of the funds from which the fee must be paid. If the source is the government, section 2412 mandates that another statute specifically provide for the attorney's fee recovery or else such recovery is clearly prohibited.

There seems to be considerable confusion both in the trial court's opinion and in the briefs as to where this money is to come from. The district court discussed at length its power to award a fee from *grant* funds[8] but then ordered the class to pay the fee from *non-grant* funds to the fullest extent possible.[9] At the same time, it ordered HEW to make a similar amount of money available to the class from *unexpended direct operations* funds, but in the same paragraph it refers to these monies as *unexpended grant* funds.[10] The parties further

[8] *Id.* at 844-46.

[9] *Id.* at 852.

[10] The court finds it fully consistent with its judgment on the merits of this case to order defendants to obligate an additional $105,500 to the RMPs. This money, *obligated originally to direct operations*, was not needed for direct operations and thus the funds should go to the RMPs for their much-needed operations. . . . Since *unexpended grant funds* remain available, it is proper that each RMP's grant be enlarged by the amount of its unexpected legal expense.

Id. (Emphasis added).

complicate the matter. Wagshal contends that HEW failed to follow the district court's pendente lite order to obligate *unspent grant funds* to the reserve fund.[11] HEW in turn objects to the use of *program income* monies to partially pay the fee,[12] an objection which was not voiced at the district court level.[13]

The conclusion which we draw from all of this is that the district court appears to have engaged in a valiant effort to avoid the strictures of section 2412. The court's payment formula makes it appear as if the RMPs are the source of the fee payment, when in fact it is the government which is ultimately being charged with the award. This device cannot camouflage the true payor of the fee: the government.

Whether these monies are labeled unexpended direct operations or unexpended grant funds is not important. Both of these funds were part of the same congressional appropriation and subject to the same general rules and regulations. Both lapse at the end of the budget period into the United States treasury and cannot again be reached by the grantees without an authorization from HEW.[14] We held in *NCCMHC* that such unexpended

[11] Wagshal Brief at 37-39.

[12] HEW Brief at 34 n.27.

[13] NARMP v. Weinberger, *supra* at 844, 852 n.3; Wagshal Brief at 25.

[14] *See* HEW Reply Brief at 5 & n.6, 16 & n.17; Wagshal Brief at 30, 38. The precise manner in which federal grant funds are disbursed was fully discussed in *National Council of*

funds properly belong to the government and therefore an award of attorney's fees from these funds would be an award against the United States prohibited by section 2412, unless otherwise specifically authorized by another statute. Slip Op. at 7.

No other statute specifically authorizes this award. The Public Health Service Act clearly sets forth the purposes for which the appropriated funds are to be used; attorney's fees are not mentioned. *See* 42 U.S.C. §§ 299-299j (1970). A specific authorization allowing attorney's fees cannot be found in the HEW regulations implementing the grant program. *See* 42 C.F.R. §§ 54.401-414 (1975). In fact, these implementing regulations very pointedly state that "[t]he grantee will use grant funds solely for the purposes for which the grant was made . . . ." 42 C.F.R. § 54.405(a) (1975). The only mention of attorney's fees is in the uniform administrative requirements and cost principles regulations which clearly provide that all legal costs incurred in a suit against the government are *not* allowable.[15] As in *NCCMHC* the court is thus left with no equitable jurisdiction to award attorney's fees in this case where the payment would come from the United States government. *NCCMHC*, *supra*, Slip Op. at 8-9. Since we hold that the district court is prohibited by statute from awarding Wagshal a fee from government funds, we must proceed to the question of

---

Community Mental Health Centers, Inc. v. Mathews, Nos. 75-1335, -1353 (D.C. Cir. Nov. 9, 1976) (hereinafter NCCMHC).

[15] 45 C.F.R. Part 74, Subpart Q, Appendix F, § G-31(d) (1975) states:

> (d) Costs of legal, accounting and consulting service[s], and related costs, incurred in connection with . . . the prosecution of claims against the Government, are unallowable.

whether the individual class members could be charged with the fee payment.[16]

III. The Need for Adequate Representation

Contrary to the situation in *NCCMHC*, the class members in this action were given actual notice of the proposed settlement on the merits, along with an opportunity to object to any of its provisions, as well as actual notice of the fee application and of each member's right to participate in this proceeding.[17] As in *NCCMHC* however, none of the individual class members actually appeared before the court. On the basis of these facts and the court's prior certification of the class on the merits pursuant to Fed. R. Civ. P. 23(b)(1) and (2), it found continuing in personam jurisdiction over the individual RMP class members.

It is important to note at the outset that the parties have switched positions. In this fee application, Jerome Wagshal, the attorney for the class on the merits, is suing both HEW and the class members for an attorney's fee. Even though Wagshal is proceeding *pro se* in the instant litigation, he also is serving as counsel for the National Association of Regional Medical Programs, Inc. (NARMP), an association which includes all 53 RMPs.[18] NARMP retained Wagshal to bring a class ac-

---

[16] The government suggests that, if the court finds that it has in personam jurisdiction over the individual class members, an enforceable contractual obligation might be found between Wagshal and the class members. This issue was not reached by the trial court because it determined that grant funds could be used to pay the fee. HEW Brief at 42 n.32.

[17] *Compare* NARMP v. Weinberger, *supra* at 843, 846 *with* NCCMHC, *supra*, Slip Op. at 5.

[18] We note with concern the apparent conflicts of interest which arise when a class action attorney prosecutes his own fee application against the class members and at the same

tion to compel release of the illegally impounded grant funds. The retainer agreement was modeled after the one employed in the *NCCMHC* case.[19] This agreement was a contract exclusively between NARMP and Wagshal which provided that NARMP would put up a minimum initial fee (amounting to $21,070)[20] and if the litigation proved successful, a fee would be sought from the class and the initial fee refunded to NARMP. Wagshal has in fact made this refund.[21]

In order to properly certify a class, a court must find that the named representatives of the class will "fairly and adequately protect the interests of the class," as required by FED. R. CIV. P. 23(a)(4). The named representatives of the RMPs were NARMP and two individual RMPs. There is no question but that on the merits, the class was adequately represented by NARMP through its counsel, Jerome Wagshal. The two individual RMPs, on the other hand, were apparently named in order to assure that the plaintiffs had standing to bring the suit. They never submitted any papers to the court and were not represented by separate attorney in this fee proceeding.

Basic considerations of fairness require that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment.[22] Two

---

time serves as counsel on appeal to a named representative of the class (NARMP) which purportedly is attempting to protect the interests of the individual RMP class members.

[19] NCCMHC, *supra* at 4-5 & n.5.

[20] Wagshal Brief at 5 n.7; NARMP Reply Brief at 3 n.5.

[21] Note 20 *supra*.

[22] This is especially important because of the broadened res judicata effect under the 1966 amendments to FED. R. CIV. P. 23. *See* Gonzales v. Cassidy, 474 F.2d 67, 74-75 (5th

criteria for determining the adequacy of representation are generally recognized: 1) the named representative must not have antagonistic or conflicting interests with the unnamed members of the class, and 2) the representative must appear able to vigorously prosecute the interests of the class through qualified counsel.[23] *Senter v. General Motors Corp.*, 532 F.2d 511, 524-25 (6th Cir. 1976).

As in *NCCMHC*,[24] it is obvious that NARMP no longer shares common interests with the individual RMPs since it stands to benefit from the refund due it by Wagshal if attorney's fees are ultimately awarded against the class members. The awkward position in which NARMP (represented by Wagshal) finds itself is well illustrated by its attempt to champion the RMPs' "right to pay a fee"! NARMP Reply Brief at 2. Since no one else appeared on behalf of the class in this fee application, the only reasonable conclusion which can be drawn is that the class was *not* adequately represented by a named member without conflicting interests in this fee case. This being so, we must now decide whether notice and an opportunity to participate, without adequate representation by a class member, are sufficient prerequisites to confer in personam jurisdiction on the court in this class action. At this point, this case goes one step farther than the *NCCMHC* case.

Cir. 1973); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (*Eisen II*); Dolgow v. Anderson, 43 F.R.D. 472, 493 (E.D.N.Y. 1968), *rev'd on other grounds*, 438 F.2d 825 (2d Cir. 1971); 7 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1765, at 616-17 (1972) (hereinafter WRIGHT AND MILLER); 3B J. MOORE, FEDERAL PRACTICE ¶ 23.07[1], at 23-357 & n.32 (2d ed. 1975).

[23] *See also* WRIGHT AND MILLER, § 1768, at 638.

[24] NCCMHC, *supra*, Slip. Op. at 10.

Debate over the due process requirements of class action proceedings has focused predominantly on the sufficiency of notice to the class members and their opportunity to be heard.[25] The proposition that there must also be adequate representation originated in the leading Supreme Court case of *Hansberry v. Lee*, 311 U.S. 32, 42 (1940).[26] This additional factor however, has often been viewed since *Hansberry* as ancillary to the notice requirement and thus the law governing the interrelationship between notice and adequate representation in a class action remains unclear.[27]

One of the leading cases in which a court has found that adequate representation in class actions is constitutionally mandated is *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973). In his opinion for the court, Judge Ingraham reasoned that, since the 1966 amendments to Rule 23 eliminated the distinctions between true, hybrid and spurious class actions, along with the concomitant differing res judicata effect of each type of action, due process of law requires that absent members of a class be adequately represented in order to be bound by the court's judgment.[28] *Id.* at 74-75. At least in the view

---

[25] *See, e.g., Developments in the Law—Class Actions*, 89 HARV. L. REV. 1321, 1402-16, 1471-75 (1976); Comment, *The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23*, 123 U. PA. L. REV. 1217 (1975); Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[26] "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . ." Hansberry v. Lee, 311 U.S. 32, 42-43 (1940).

[27] *See* 89 HARV. L. REV., *supra* at 1402-03; 123 U. PA. L. REV., *supra* at 1218-19.

[28] *See also* Note, *Collateral Attack on the Binding Effect of Class Action Judgments*, 87 HARV. L. REV. 589, 595-96 (1974); Sagers v. Yellow Freight Systems, Inc., 68 F.R.D. 686, 689 (N.D.Ga. 1975), *aff'd*, 529 F.2d 721 (5th Cir. 1976).

of the Fifth Circuit then, adequacy of representation would appear to be both a prerequisite to class suit under Rule 23(a)(4) and a constitutional requirement as well.[29]

It seems clear to us, too, that the adequacy of class representation has a constitutional dimension. Class actions involve the delegation of authority to a named representative to pursue a common goal. In this pursuit, it is not only the duty of the class representative to ensure that the absent members' interests are adequately protected; it is also a responsibility that the process of class adjudication as a whole must shoulder.[30] In this regard one court has noted that:

> [u]nless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs.

Dierks v. Thompson, 414 F.2d 453, 456 (1st Cir. 1969), *citing Hansberry v. Lee*, *supra*. In the case at bar, NARMP (the purported class representative) is seeking to uphold the district court's judgment *against* the absentee class members. This course of action obviously is not in the best interests of the individual class members.[31]

---

[29] *See generally* Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972); Dierks v. Thompson, 414 F.2d 453 (1st Cir. 1969); 89 HARV. L. REV., *supra* at 1471. *Cf.* In re Four Seasons Securities Laws Litigation, 502 F.2d 834, 842-43 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974).

[30] 89 HARV. L. REV., *supra* at 1410-11.

[31] Responsibility for ensuring adequacy of representation must devolve first of all on the trial court since it is the only person in a position to objectively assess the typicality of interests between the named representatives and the absent class members. However, class counsel must recognize his

It is evident therefore that this lack of adequate representation of the absentee class members, both here and in the district court, denies them due process of law and prevents the court from assuming personal jurisdiction over the absentee members.[32] The district court thus erred in awarding an in personam judgment of attorney's fees against the individual class members.[33]

IV. Conclusion

We find that 28 U.S.C. § 2412 prevents us from awarding Wagshal an attorney's fee out of unexpended federal grant funds, as these funds belong to the United States government. The court also may not charge the individual class members with payment of the fee because it does not have jurisdiction over them due to their lack of adequate representation in the fee proceeding. We need not reach the third issue concerning the size of the award, since the judgment of the district court must in any case be reversed.

So ordered.

---

responsibility to identify representation problems so that they may be cured. Counsel has the obligation to report conflicts of interest among class members should they arise during the course of litigation. *See* 89 Harv. L. Rev., *supra* at 1411, 1592-97.

[32] *See generally* 123 U. Pa. L. Rev., *supra* at 1227-28 & n.46.

[33] We note that prior to the institution of this fee proceeding the RMPs had unanimously agreed to pay Wagshal $106,000 from non-grant funds as an "interim partial" fee payment. The sum and substance of all the parties' and courts' efforts therefore were apparently engaged for the purpose of attaining a much larger fee. NARMP Reply Brief at 2 & n.1; HEW Brief at 51.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976 – Civil Action 1807-73

No. 75-1615

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Civil Action 1807-73

No. 75-2001

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Jerome S. Wagshal,

Appellant.

Before: Tamm, MacKinnon and Robb, Circuit Judges

[Filed January 31, 1977]

ORDER

Upon consideration of the motion of appellee-cross appellant Wagshal for extension of time within which to petition for reconsideration and/or suggest rehearing *en banc*, and of the motion of appellees National Association of Regional Medical Programs, Inc., et al. for extension of time within which to petition for reconsideration and/or suggest rehearing *en banc*, it is

ORDERED by the Court that the aforesaid motions for extension of time are denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976 – Civil Action 1807-73
No. 75-1615

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Civil Action 1807-73
No. 75-2001

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Jerome S. Wagshal,

Appellant.

Before: Tamm, MacKinnion and Robb, Circuit Judges

[Filed February 11, 1977]

ORDER

Upon consideration of the motion of Lakes Area Regional Medical Program, Inc. and Medical Care Development Incorporated, for leave to file their petition for rehearing and/or suggestion for rehearing *en banc* time having expired, and/or to extend the time for filing the same, and of the motion of National Association of Regional Medical Programs, Inc., for leave to file its petition for rehearing and/or suggestion for rehearing *en banc* time having expired, and/or to extend time for filing the same, and it appearing that movants' petitions for rehearing *en banc* have been lodged in the Clerk's Office, it is

ORDERED by the Court that these motions are denied, and the Clerk is directed to return tocounsel the lodged petitions for rehearing and/or suggestions for rehearing *en banc*.

Per Curiam

For the Court: /s/ George A. Fisher, Clerk.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1976 – Civil Action 1807-73
No. 75-1615

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Civil Action 1807-73
No. 75-2001

National Association of Regional Medical Programs, Inc., et al.,

v.

Honorable F. David Mathews, Individually and as Secretary of Health, Education and Welfare, et al.,

Appellants,

Jerome S. Wagshal,

Appellant

Before: Tamm, MacKinnion and Robb, Circuit Judges

[Filed February 16, 1977]

ORDER

Upon consideration of the motion of appellee-cross appellant Wagshal for leave to file petition for rehearing and/or suggestion for rehearing *en banc* out of time, and/or to extend the time for filing the same, it is

ORDERED by the Court that the aforesaid motion is denied, and the Clerk is directed to return to counsel the lodged petition for rehearing and/or suggestion for rehearing *en banc*.

Per Curiam

For the Court: /s/ George A. Fisher, Clerk.

Nos. 76-1266 and 76-1304

Supreme Court, U. S.
FILED
MAY 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

JEROME S. WAGSHAL, PETITIONER

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BARBARA ALLEN BABCOCK,
Assistant Attorney General,

LEONARD SCHAITMAN,
ELOISE E. DAVIES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

Page

Opinions below 1

Jurisdiction 2

Question presented 2

Statement 2

Argument 6

Conclusion 10

CITATIONS

Case:

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 4

Statutes and rule:

Community Mental Health Centers Act, 79 Stat. 427, as amended, 42 U.S.C. 2688 *et seq*:

Public Health Service Act, Title IX 79 Stat. 926, as amended, 42 U.S.C. 299 *et seq.* 4

28 U.S.C. 2412 ..... 3, 5, 6, 7

Fed. R. Civ. P., Rule 23(c)(4)(A) 8

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1266

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

No. 76-1304

JEROME S. WAGSHAL, PETITIONER

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

In No. 76-1266, the opinion of the court of appeals (Pet. App. 46A-58A) has not yet been reported. The opinion of the district court (Pet. App. 22A-41A) is reported at 396 F. Supp. 842.

In No. 76-1304, the opinion of the court of appeals (Pet. App. 26a-36a) is reported at 546 F. 2d 1003. The opinion of the district court (Pet. App. 15a-25a) is reported at 387 F. Supp. 991.

JURISDICTION

In No. 76-1266, the judgment of the court of appeals was entered on December 13, 1976. The petition for a writ of certiorari was filed on March 11, 1977.

In No. 76-1304, the judgment of the court of appeals was entered on November 9, 1976. A timely petition for rehearing was denied on January 13, 1977. The petition for a writ of certiorari was filed on March 18, 1977.

QUESTION PRESENTED

Whether petitioner Wagshal was entitled to an award of attorney's fees from funds appropriated under Title IX of the Public Health Service Act (in No. 76-1266) or under the Community Mental Health Centers Act (in No. 76-1304), notwithstanding the absence of any applicable provision in either statute authorizing such an award.

STATEMENT

A. No. 76-1304.

Petitioner, an attorney, represented the plaintiffs in a successful class action brought on behalf of the National Council of Community Mental Health Centers and 138 community mental health centers to compel the Secretary of Health, Education, and Welfare to obligate $52,050,000 appropriated for expenditure under the Community Mental Health Centers Act, 79 Stat. 427, as amended, 42 U.S.C. 2688 *et seq.* (see Pet. App. 4a-14a). After the conclusion of that litigation on the merits, petitioner commenced ancillary proceedings against the federal respondents and the

individual community mental health centers seeking an award of attorney's fees from the released program funds. The fee sought was in addition to a fee of $13,216.25 that had been paid to petitioner by the National Council under a retainer agreement executed prior to the litigation. The district court declined to enter *in personam* judgments against the community mental health centers, holding that their representation in the ancillary proceeding was inadequate to support jurisdiction (Pet. App. 18a). However, the court awarded petitioner a fee of $65,000 to be paid by the Secretary of Health, Education, and Welfare from unexpended grant funds (Pet. App. 24a). The petitioner was directed to pay $13,216.25 of this amount to the National Council, in order to reimburse the individual class members for the amount each had contributed to the retainer fee (Pet. App. 25a).

The court of appeals affirmed the district court's ruling that it lacked *in personam* jurisdiction to award judgments for attorney's fees against individual members of the plaintiff class (Pet. App. 28a, 35a). However, the court reversed the district court's judgment requiring the Secretary to pay a fee from unexpended grant funds. The court determined that such unexpended funds belonged to the United States rather than to the plaintiff grantees, since the grant funds could be expended only for authorized program purposes and unexpended funds would revert to the public treasury at the end of each fiscal year (Pet. App. 32a). Accordingly, the court held that such a fee award was barred by 28 U.S.C. 2412,[1] which prohibits an award

---

[1]The court also determined that the Community Mental Health Centers Act did not authorize the payment of attorney's fees (Pet. App. 32a) and that the Secretary's implementing regulations expressly forbid the use of grant funds for " 'costs * * * incurred in connection with * * * the prosecution of claims against the Government' " (Pet. App. 33a).

of attorney's fees in actions brought against officials of the United States acting in their official capacities except as specifically provided by statute, and by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (Pet. App. 36a).

B. No. 76-1266.

Petitioner Wagshal represented the plaintiffs in a successful class action brought on behalf of petitioner National Association of Regional Medical Programs (NARMP) and 53 individual Regional Medical Programs (RMP's) to compel the Secretary of Health, Education, and Welfare and other federal officials to obligate approximately $100 million appropriated for expenditure under Title IX of the Public Health Service Act, 79 Stat. 926, as amended, 42 U.S.C. 299 *et seq.* (see Pet. App. 1A-21A). After the conclusion of that litigation on the merits, petitioner Wagshal, as he did in No. 76-1304, commenced ancillary proceedings for an award of attorney's fees against the federal defendants and the plaintiff class.[2] After the fee application was filed, the district court ordered the federal defendants to reserve *pendente lite* up to $200,000 of the appropriated funds released by the litigation to provide a *res* for a potential fee award. The Secretary deposited $180,000 in "direct operations" funds[3] with the court pending the court's final order in the fee proceeding.

[2]NARMP had paid Wagshal a $21,070 fee pursuant to a retainer agreement, and the plaintiff class had volunteered to pay him a further fee of $106,000 from non-grant funds (Pet. 12). In the ancillary proceedings, Wagshal sought still additional monies from federal grant funds (*ibid.*).

[3]These "direct operations" funds were funds that had been set aside, according to HEW's accounting practices, for overhead and operational costs incurred in administering grant programs. See our memorandum in opposition to the related petition in *National Association of Regional Medical Programs, Inc.* v. *Califano*, No. 76-1265.

After a hearing, the court ruled that it had authority to award a fee from the monies deposited in the court's account (Pet. App. 24A-26A) and that it had jurisdiction to enter an *in personam* order against individual members of the plaintiff class for the payment of attorney's fees from either grant or non-grant funds (*id.* at 29A-31A). The court awarded petitioner Wagshal $105,500 and devised a formula for payment whereby each member of the plaintiff class would pay its *pro rata* share of the fee and then be entitled to recoup its payment from the federal monies deposited with the court (*id.* at 42A-45A).[4] The court concluded that "[s]ince unexpended grant funds remain available, it is proper that each RMP's grant be enlarged by the amount of its unexpected legal expense" (Pet. App. 41A). Petitioner Wagshal was required by the terms of the order to refund to petitioner NARMP the amount he had received under the retainer agreement.[5]

The court of appeals reversed the district court's judgment against both the federal defendants and the individual class members. The court held that the fee award from unexpended grant funds contravened 28 U.S.C. 2412 because these funds belonged to the United States (Pet. App. 58A). The court further held that the individual class members could not be charged with payment of the fee from their non-grant funds because they were not adequately

[4]The payment by the individual RMP's was to be made "to the extent possible from funds other than grant funds and to the extent necessary from program income funds * * *" (Pet. App. 43A). However, any member who had insufficient non-grant funds was authorized "to use grant funds to complete payment" (*ibid.*).

[5]The court of appeals subsequently stayed the district court's order insofar as it required the Secretary to pay over the deposited funds to the individual RMP's which now have paid their share of petitioner Wagshal's fee from program funds (Pet. App. 49A-50A).

represented at the fee proceeding (*ibid.*).[6] The court found that the representation was inadequate because petitioner Wagshal in fact was suing the class members while purporting to represent them through NARMP, which in turn stood to recoup the $21,070 paid pursuant to the retainer agreement if the fee application against the individual RMP's succeeded. The court reasoned that since there was no qualified counsel to represent the individual class members in the fee proceeding, due process considerations prevented an *in personam* judgment against them (Pet. App. 58A).

ARGUMENT

In each case, the court of appeals correctly determined that the funds from which the district court ordered payment of attorney's fees were funds that were subject to lapse at the end of the budget period into the United States treasury (Pet. App. 32a, No. 76-1304; Pet. App. 51A, No. 76-1266); thus the award of attorney's fees from those funds was barred by 28 U.S.C. 2412.

Contrary to petitioners' assertion (Pet. 20-23, No. 76-1304; Pet. 27-28, No. 76-1266), the court of appeals did not ignore "three controlling statutes". The statutes that petitioners invoke relate to the Secretary's duty to carry out congressionally authorized mental health programs without impounding appropriated funds. As we note in our memorandum in opposition in *National Association of Regional Medical Programs, Inc.* v. *Califano*, No. 76-1265, p. 3 n. 1, those statutes were enacted simply to insure that the expiration of the fiscal year would not place disputed funds beyond the reach of courts adjudicating impoundment claims. Those statutes do not require or permit such funds to be made available for payment of attorney's fees.

[6] The court did not reach the question of the appropriateness of the amount awarded in view of this reversal of the district court's judgment (Pet. App. 58A).

The appropriated funds therefore remained monies of the United States for purposes of 28 U.S.C. 2412. That statute contains no exception for the "common fund" or "common benefit" doctrine on which petitioners rely. As the court of appeals noted in No. 76-1304, the "common fund" rule invoked by the district court "collides with the express provision of 28 U.S.C. §2412" (Pet. App. 34a). See also Pet. App. 52A, 76-1266. Thus the court of appeals was "constrained to follow the specific statutory prohibition" (Pet. App. 34a, No. 76-1304) and to disallow the fee award.[7]

A. No. 76-1304.

Although the federal respondents have no direct stake in this issue, it is our view that the district court and the court of appeals correctly rejected petitioner's argument that the district court had jurisdiction to enter *in personam* judgments against the individual community mental health centers who were members of the plaintiff class. The district court reasonably held that its power "to render binding *in personam* judgments consistent with due process finds its source in the presence of adequate representatives of the class before the court * * *" (Pet. App. 17a). It concluded that while the class representation during the litigation on the merits was adequate, the

[7] It follows that there is no merit to petitioner's claim in No. 76-1304 (Pet. 23-25) that the court of appeals set aside the district court's "factual findings". The district court erred as a matter of law in holding that it could award attorney's fees to petitioner from grant funds under the "common fund" or "common benefit" theory (Pet. App. 19a-20a), and the court of appeals' reversal was based on its construction of the statute rather than on factual grounds.

Petitioner also argues in No. 76-1304 (Pet. 25-26) that the underlying litigation did not involve a "claim against the Government" within the meaning of HEW regulations that deny attorney's fees in connection with such claims. This argument is frivolous. A claim for release of impounded funds is self-evidently a claim against the government.

application for a fee presented "quite different questions" in that the interests of the National Council were "antagonistic to those of the class on several issues because, among other things, it is seeking return of the fees it has already advanced to [petitioner] as front money" (Pet. App. 18a). Because none of the community mental health centers named as plaintiffs and certified as representatives of the class action appeared in the portion of the case relating to petitioner's fee application, the district court concluded that they were no longer adequately represented. See Rule 23(c)(4)(A), Fed. R. Civ. P.

The court of appeals affirmed the district court's judgment on this issue, noting that adequate representation was a touchstone of due process in class suits and that it was "sorely lacking here" (Pet. App. 35a). The determination of the lower courts that the National Council did not adequately represent the individual class members in the fee application phase of this litigation appears to turn upon the particular facts of this case and does not prevent petitioner Wagshal from seeking recovery of a fee in a separate action. Accordingly, this holding involves no issue of sufficiently general importance to warrant further review.

B. No. 76-1266.

The only respect in which this case differs from No. 76-1304 is that in this case the unnamed class members received notice of petitioner Wagshal's application for attorney's fees (Pet. App. 53A). The district court held that this sufficed to confer *in personam* jurisdiction over the unnamed class members and ordered them to pay petitioner Wagshal's fee from non-grant funds "to the extent possible" but from grant funds to the extent necessary (Pet. App. 42A-43A).

In reversing the district court's ruling on this issue, the court of appeals noted the obvious conflict of interest between the unnamed class members and NARMP, the named plaintiff whose advance to petitioner Wagshal would be reimbursed out of the payment made by the unnamed class members, and concluded that "the only reasonable conclusion which can be drawn is that the class was *not* adequately represented by a named member without conflicting interests in this fee case" (Pet. App. 55A; emphasis in original). The court held that, notwithstanding the notice and opportunity to participate accorded to class members, the "lack of adequate representation of the absentee class members, both here and in the district court, denies them due process of law and prevents the court from assuming personal jurisdiction over the absentee members" (Pet. App. 58A).

While we believe that the court of appeals' decision on this issue was correct, the government has taken the position throughout the fee litigation that it has no interest in the question whether fees are assessed against the unnamed class members individually, so long as such fees are not paid from federal grant funds and payment of the fees from other sources does not impair their operating efficiency (see Pet. App. 23A-24A, 41A n. 3). It appears, moreover, that adequate representation of the absent class members could have been provided in this case by the appointment of separate counsel to represent their interests in the fee proceeding (see Pet. App. 57A n. 31), but petitioners apparently failed to suggest such a procedure to the district court. Furthermore, as in No. 76-1304, it remains open to petitioner Wagshal to seek recovery of a fee in a separate proceeding. In view of these considerations, it seems plain that this case presents no question warranting this Court's review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BARBARA ALLEN BABCOCK,
Assistant Attorney General.

LEONARD SCHAITMAN,
ELOISE E. DAVIES,
Attorneys.

MAY 1977.

DOJ-1977-05

Supreme Court, U. S.
FILED
MAY 27 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Nos. 76-1266 and 76-1304

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., *et al.*,

Petitioners,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

JEROME S. WAGSHAL,

Petitioner,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER JEROME S. WAGSHAL

JEROME S. WAGSHAL
Suite 703
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

Page

I. FEE AWARDS FROM GRANT FUNDS. 2

II. FEE AWARDS FROM CLASS MEMBERS 9

III. PENDENCY OF A RELATED CASE 10

CITATIONS

Cases:

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 . . . . . 2, 3, 4

Houston v. Ormes, 252 U.S. 469 . . . . . 5, 7, 8

Lafferty v. Humphrey, 101 U.S. App. D.C. 222, 248 F.2d 82, *cert. denied, sub nom., Benton County v. Lafferty*, 355 U.S. 869 . . . . . 5, 7

Mitchell v. DeMario Jewelry, 361 U.S. 288 8

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 9

National Association for Mental Health v. Califano, Nos. 75-2212 and 75-2245 (D.C. Cir.), appeal pending from 68 F.R.D. 387 (D.D.C. 1975). 10

National Association for Mental Health v. Weinberger, 68 F.R.D. 387 (D.D.C. 1975), appeal pending 10

Porter v. Warner Co., 328 U.S. 395 . . . . . 4, 6, 8

Sprague v. Ticonic National Bank, 307 U.S. 161 4

United States v. Equitable Trust Co., 283 U.S. 738 6

Statutes:

28 U.S.C. §2412. . . . . 3, 4

Sec. 601 of the Medical Facilities Construction and Modernization Amendments of 1970, 85 Stat. 353, 42 U.S.C.A. §§201 note and 2661 note 6

Statutes, continued: Page

42 U.S.C. Title IX, Public Health Service Act 3

Community Mental Health Centers Act, 79 Stat. 427, as amended, 42 U.S.C. §§2688 et seq. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

Nos. 76-1266 and 76-1304

NATIONAL ASSOCIATION OF REGIONAL MEDICAL PROGRAMS, INC., *et al.*,

Petitioners,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

---

JEROME S. WAGSHAL,

Petitioner,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *et al.*,

---

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER JEROME S. WAGSHAL

The important issue presented by these two petitions is whether this Court will permit a major exception to be created in the "common benefit" or "common fund" principle of judicial attorneys' fee awards, after

that principle has been consistently followed in the Federal courts for almost a century. The exception which the two court of appeals decisions have created is to deny the application of that principle in cases involving the recovery of Federal grant funds, in these cases HEW grant funds, for the benefit of plaintiff classes of private persons, the grant recipients. In the light of the fact that most HEW appropriations bills have been vetoed in the recent past, and in the light of reports that the current HEW appropriation bill is opposed by the present Administration, this issue is clearly one of continuing concern, involving a problem likely to recur.[1]

I.

FEE AWARDS FROM GRANT FUNDS

The Federal respondents' opposition attempts to turn the Court's focus away from the key issue presented by these two cases, by confusing the "common benefit" fee award with the award which was the subject of this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240. The distinction between these two types of judicial fee awards is critical:

> – The fee award dealt with in *Alyeska* was one to be paid by a losing defendant to a prevailing plaintiff. *Alyeska* limited the instances when such an award could be made.
>
> – The fee award presented by these two cases involves payment by a prevailing plaintiff (and

[1] See The Washington Post, Monday, May 23, 1977, p. 1, col. 3, "SHAKEDOWN CRUISE FOR CARTER-HILL. A POSSIBLE MONEY BILL VETO," Walter Pincus.

> plaintiff class members) to the attorney who successfully represented them.

There is a world of practical difference between these two situations. In the former, the benefiting plaintiff *receives* the money from his defeated adversary. In the latter case the benefiting plaintiff *pays* the money to the attorney who obtained the benefit for him. In *Alyeska* this Court was careful to make clear that it was not limiting, indeed, was endorsing the second type of fee award. 421 U.S. at 258.

The two cases now before the Court are classic fact situations for the application of the "common benefit" type of fee award, since they involve recovery of hundreds of millions of dollars for private parties by an attorney who represented the plaintiff classes. Yet the court of appeals in the two decisions has apparently blocked every avenue by which the district court could make a "common benefit" award.

The Federal respondents' opposition is based on the assumption that the "common benefit" award made to petitioner by the district court in these two cases came from money belonging to the Federal government. Building on this premise, the Federal respondents say that the awards are barred by the decision in *Alyeska*. Building further on the same premise, they say that the awards are barred by 28 U.S.C. 2412, and that this statute "contains no exception for the 'common fund' or 'common benefit' doctrine." Opp. 7. Finally, they phrase the "Question Presented" in terms of the same argument – that the grants are made under the Public Health Service Act and the Community Mental Health Centers Act, and that there is an "absence of any applicable provision in either statute authorizing such an award." Opp. 2.

These arguments would be germane if the money awarded petitioner could be considered money of the United States. In that case, 28 U.S.C. 2412 would bar a payment from the United States as a defeated litigant, in the absence of a statute specifically authorizing the award. In other words, the necessity of finding a specific statutory authorization for the fee award arises only after it is concluded that the money to be paid petitioner belongs to the United States, not the grantees. If the money belongs to the grantees, then the burden goes the other way, *i.e.*, the award may be made in the absence of a statutory command barring it. *Compare Porter v. Warner Co.*, 328 U.S. 395, 398, quoted *infra,* p. 8

And if the money used for the awards belongs to the benefiting class members, the grant recipients, neither 28 U.S.C. 2412 nor the *Alyeska* decision apply. When the judicial fee award comes from the benefiting parties under the "common benefit" principle, it is made by virtue of the inherent equitable powers of the court, as defined in *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939). The issue presented by these two petitions is how can petitioner receive an equitable fee award from the benefting class members? The court of appeals' answer was

> Although we recognize that Wagshal has rendered a significant service . . . we cannot award him a reasonable fee.

No. 76-1304, 36a. In view of the fact that this result violates the "common benefit" rule, which hitherto had "been consistently followed" (*Alyeska, supra*, 421 U.S. at 257-8), and diminishes the equity jurisdiction of the Federal courts, petitioner urges that this Court provide a better answer.

The basic error made by the court of appeals, which the Federal respondents seek to perpetuate, is that the grant receipients could not be directed to pay petitioner their *pro rata* shares of his award out of the grant money awarded them, the grantees' available source of funds, on the ground that this money actually belonged to the United States. For many reasons this conclusion is incorrect:

1. In each case the decision on the merits ordered the money paid out to the plaintiff classes, and the fee awards came from this money. This is not a case, as the Federal respondents would have it, in which additional monies beyond those appropriated by Congress for grants are to be taxed against the Government on account of litigation costs. How can money intended under court order to be transferred to private parties still be deemed to belong to the government? (Whatever the force of defendants' regulations, restricting the grantees' use of the money see *infra,* p. 8, such regulations do not change its ownership.)

2. The court's reservation of some of the money ordered paid to the grantees, for purposes of a fee award does not change the ownership of the money. It has been repeatedly held in similar cases that the fact that the district court may reserve or divert some of the money which it has ordered paid out from the Treasury to private grantees, for use in a "common benefit" award, does not change the ownership of the money. See, *e.g.*, *Houston v. Ormes*, 252 U.S. 469; *Lafferty v. Humphrey*, 101 U.S. App. D.C. 222, 248 F.2d 82, cert. denied, sub nom., *Benton County v. Lafferty*, 355 U.S. 869. In other words, these decisions establish that the fact that the money reserved for fee payment was in the U.S. Treasury, and had not yet been paid out, did not make the government the owner of the money,

when it was legally supposed to be paid out to private recipients. The decisions denying petitioner an award reach a contrary result.

3. Since the money belongs to the grantees, not the government, the fact that statutes may specify how the grantees shall use the money or otherwise restrict the use of the money, does not strip the federal courts of their traditional equitable powers to award a fee from such funds to an attorney recovering the money. *Compare, United States v. Equitable Trust Co.*, 283 U.S. 738, 744. See also *Porter v. Warner Co.*, quoted *infra*, p. 8.

4. The requirement that the money must be paid out to the grantees is embedded in three statutes heretofore cited and discussed by petitioner: No. 76-1266, at 4-5, 27-28; No. 76-1304, at 4-5, 20-22. The Federal respondents argue that these statutes "do not require or permit such funds to be made available for payment of attorney's fees." Opp. 6. But this misses the point. What these statutes do, is require that all the impounded funds be paid out, thus changing the ownership of the money. That is how these cases were won on the merits. The Federal respondents step around this point, by saying that these three laws "relate to the Secretary's duty to carry out Congressionally authorized mental health[2] programs without impounding appropriated funds." Opp. 6. This euphemism cannot disguise the fact that these laws required the full release of the money to the designated grantees. By

[2]The statutes are of course far broader than this. Sec. 601 of the Medical Facilities Construction and Modernization Amendments of 1970 as amended, 42 U.S.C.A. §§201 note and 2661 note, applies to the entire Public Health Service Act. The other two statutes are laws of general application.

mandating the release of this money, these statutes bring these cases within the same rule as *Houston v. Ormes, supra, Lafferty v. Humphrey, supra*, and the other cases cited at 76-1266, p. 25; 76-1304, pp. 17-18.[3]

5. The question of what happens to grant funds at the end of a budget period, whether they "lapse" into the Treasury, was a factual issue on which the Court of Appeals reversed the district court in the face of unrefuted evidence that the district court was correct, that the funds do not so lapse. See the quotation at 76-1304 at 23-24. The Federal respondents continue to maintain by *ipse dixit* that these funds do "lapse" as the court of appeals concluded, without any attempt to face the existence of the conclusive evidence against this conclusion. Opp. 6. Moreover, this factual question is subsidiary to the legal mandate of the three statutes

[3]The denial of certiorari in No. 76-1265 does not alter this conclusion. No. 76-1266 made final the decision that the government had the right to hold back a portion of the appropriated funds to pay the expense of "direct operations," i.e., administering the grant programs, and to permit the money so reserved to lapse into the Treasury if not used. However, the money used by the district court for petitioner's fee awards was not taken from such reserved "direct operations" money, but rather from the released grant funds. See 76-1304, 18a ("The record discloses that a portion of the money released by the litigation remains unused.") In 76-1266, the fee award has already been paid petitioner by the class members. They paid in part from grant funds and in part from other money belonging to the grantees which did not come from the government. 76-1266, at 15-16, 40A-41A, 42A-43A. In a separate step in its order, the district court directed reimbursement to the class members from a reserve fund which the defendants chose to establish out of "direct operations" funds. *Id.* Whatever effect the denial of 76-1265 may have on this reimbursement part of the order, it does not govern the first part of the order which authorizes payment to petitioner from grant funds.

relied on by petitioner, that these grant appropriations must be paid out, a conclusion the Federal respondents nowhere directly deny.

6. In the final analysis the Federal respondents' case throughout this litigation has been based on their regulations barring payment of attorney's fee payments by HEW grantees in connection with claims against the government. Respondents' position is that "A claim for release of impounded funds is self-evidently a claim against the government." Opp. 7, n. 7. The federal government unsuccessfully maintained the same position in *Houston v. Ormes, supra*, 252 U.S. at 472-4.

* * *

The Federal respondents are in plain effect seeking to preserve the force of their own regulations as superior to the inherent equitable powers of the Federal courts. This Court has stated that

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Porter v. Warner Co., 328 U.S. 395, 398; *Mitchell v. DeMario Jewelery*, 361 U.S. 288, 291. Unless the court of appeals decisions are reversed by this Court, these basic principles of equity will be undercut in an area of great significance. This Court has never considered the application of Section 2412 to the "common fund" or "common benefit" doctrines. The lower court's application of that statute in this case, where the effect is to undermine the purposes of the substantive legislation

under which the actions were originally brought, is an important issue, worthy of consideration by this Court.

II.

FEE AWARDS FROM CLASS MEMBERS

Equally worthy of consideration by this Court is the lower court's revision of the principles laid down by this Court in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306. The concept that litigants must be adequately represented cannot be disputed in general, but this concept does not force civil litigants to retain counsel against their will. The court of appeals decisions in these two cases permit plaintiff class members to avoid an equitable payment by the device of refusing to retain counsel for the fee application proceeding. Indeed, since retention of counsel is likely to involve expense, and the class members can avoid payment by *not* retaining counsel under the court of appeals rule, why should they do so?

Thus, the important issue in this aspect of the petitions is whether adequate notice to the class members of a fee application[4] is enough to enable the court to render a judgment requiring them to pay a fee to the attorney who conferred the benefit on them. In *Mullane, supra*, this Court indicated notice was enough. It gave no suggestion that the class members could get out of the proceeding by refusing to appear in response to proper notice. The court of appeals

---

[4]There is no challenge to the adequacy of notice of the fee application in either case, and in 76-1266, no challenge to the adequacy of notice of the litigation on the merits, as well. See 76-1266 at 29A, 53A.

decisions in these cases permit petitioner to be euchred out of his fee award by just such a device.

Petitioner re-emphasizes that the record in 76-1266 establishes that all class members had been canvassed before the district court's hearing on the fee application, and had unanimously agreed to pay a fee such as might be awarded by the court. *Further, all class members have already paid petitioner his fee.* The Federal respondents suggest that petitioner now bring a separate proceeding for this fee already paid him. Review by this Court of the basic principle involved would be a better course than such a formalism.

III.

PENDENCY OF A RELATED CASE

Petitioner again invites the Court's attention to the pendency of a third, and related fee application proceeding in the court of appeals, *National Association for Mental Health v. Califano*, Nos. 75-2212 and 75-2245 (D.C. Cir.). Briefing has been completed in that appeal, and the Federal appellants have moved for summary disposition without oral argument.

The *National Association for Mental Health* appeal raises many of the same issues presented by the instant petitions. See opinion of the district court at 68 F.R.D. 387.

However, among several significant differences in that case are:

(i) The fee award was made largely from actual deductions from grants made to class members; and

(ii) At the fee hearing, class members appeared by separate counsel and actively opposed the award.

Thus, this Court may wish to defer consideration of the instant two petitions, to see if the court of appeals decision in this third case adds a piece to the mosaic of law created by these two decisions of the court of appeals, which should be considered as a whole by this Court.

JEROME S. WAGSHAL
Suite 703
1140 Connecticut Ave., N.W.
Washington, D.C. 20036
Petitioner.

see

76

1304